TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1965

No. 341

FLOYD A. WALLIS, PETITIONER,

vs.

PAN AMERICAN PETROLEUM CORPORATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 13, 1965
CERTIORARI GRANTED OCTOBER 11, 1965

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

No. 8904

Civil Action

PATRICK A. MCKENNA

versus

FLOYD A. WALLIS and PAN AMERICAN PETROLEUM CORPORATION, a corporation.

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* * * * * * *

[fol. 2] COMPLAINT—Filed March 27, 1959

I.

Plaintiff, Patrick A. McKenna, is a citizen of Washington, District of Columbia; Defendant, Floyd A. Wallis (hereinafter referred to as Wallis), is a citizen of the Parish of Orleans, State of Louisiana, and Defendant, Pan-American Petroleum Corporation (hereinafter referred to as Pan-American), is a private corporation organized and existing under the laws of the State of Delaware and qualified as a foreign corporation under the laws of the State of Louisiana, with an office in the City of New Orleans, State of Louisiana. The matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand ($10,000.00) Dollars.

II.

This action is brought under the Declaratory Judgment Act, 28 U.S.C.A., Sections 2201 and 2202, and there is an actual controversy among the parties.

III.

In January, 1954, the plaintiff and defendant, Wallis, commenced, and thereafter carried on, a joint venture for the acquisition of an oil and gas lease or leases covering certain lands in Plaquemines Parish, Louisiana. As a result of their joint efforts, defendant, Wallis, filed Acquired Lands Oil and Gas Lease Applications numbered BLM-A-037435, BLM A-037866, BLM-A-037437, BLM A-037438 and [fol. 3] BLM A-037439, covering in the aggregate 826.87 acres of land in Townships 24 and 25 South, Range 30 East, Louisiana Meridian, Plaquemines Parish, Louisiana. Thereafter, by letter agreement dated December 27, 1954, defendant, Wallis, acknowledged plaintiff's ownership of an undivided one-third (⅓) interest in the aforesaid oil and gas lease applications and simultaneously executed powers of attorney in favor of plaintiff concerning the aforesaid lease applications. The consideration for the interest acquired by the plaintiff in these lands was the work performed prior to that date by the plaintiff before the Bureau of Land Management, Department of the Interior, in ascertaining and checking the correct description of these lands pursuant to the joint venture agreement, payment by the plaintiff of one-half (½) of the filing fees and first year's rentals of these applications and payment then and thereafter of one-half (½) of attorneys' fees incurred in the prosecution of these applications before the Bureau of Land Management of the Department of the Interior and its sub-office, the Eastern States Land Office, and other work which will be shown during the course of the trial. (A photostatic copy of this letter agreement between the plaintiff and the defendant, Wallis, is annexed hereto and made part hereof as Exhibit "A".) This agreement, dated December 27, 1954, and accepted by plaintiff on January 3, 1955, was filed of record in the files of the Bureau of Land Management on February 3, 1955 at 2:49 P.M. There was [fol. 4] also filed in each of these files in the Bureau of Land Management a letter from Floyd A. Wallis, advising

the Director of the Bureau of Land Management of a written agreement between the plaintiff and the defendant, Wallis, indicating that the plaintiff was to receive an interest in the respective leases on issuance.

IV.

Plaintiff and defendant, Wallis, in the ensuing months after February 3, 1955, as in the year 1954, cooperated jointly in their venture to bring about the issuance of a lease or leases on the above described lands to defendant, Wallis. Since these joint efforts necessitated legal representations in behalf of plaintiff and defendant, Wallis, before the Bureau of Land Management, Department of the Interior, plaintiff and defendant, Wallis, retained Washington counsel to represent them before this agency. Plaintiff and defendant, Wallis, assumed and paid equally the costs of this legal representation in accordance with the understanding between these joint adventurers.

V.

In late 1955 and early 1956, as a result of research conducted by the plaintiff and Mr. Edelstein, the then attorney for the plaintiff and defendant, Wallis, and as a result of conferences with responsible officials of the Bureau of Land Management, in which conferences plaintiff participated, it was determined that a Public Lands Application should [fol. 5] be filed in Wallis' name with the Bureau of Land Management with most carefully prepared land descriptions, covering the same lands described in the Acquired Lands Application BLM A-037435, 037436, 037437, 037438 and 037439, to insure that a lease would be issued to defendant, Wallis, whether the said lands were determined to be Acquired Lands or Public Lands. After careful research had been conducted cooperatively by the plaintiff in Washington, a Public Lands Application was prepared and forwarded to Wallis for his signature. A copy of this Public Lands Application BLM 042017 was forwarded to

plaintiff by Mr. Edelstein, plaintiff's and defendant, Wallis' attorney, on March 8, 1956. Plaintiff continued to pay his fifty (50%) per cent share of legal fees for services performed by Mr. Edelstein for plaintiff and defendant, Wallis, in accordance with statements submitted by Mr. Edelstein through April 17, 1956, after which time no further statements of fees for legal services were submitted to plaintiff.

VI.

Defendant, Wallis, on April 23, 1956, advised the plaintiff that he was revoking powers of attorney previously given to the plaintiff to represent his interest in connection with the Acquired Lands Applications before the Bureau of Land Management, and defendant, Wallis, so advised the Director of the Bureau of Land Management in letters dated April 23, 1956. By letter dated May 4, 1956, defendant, Wallis, advised plaintiff that he, Wallis, did not [fol. 6] recognize the agreement, dated December 27, 1954, pursuant to which plaintiff acquired an undivided one-third (⅓) interest in certain Federal Oil and Gas Lease Applications. This letter was written after a meeting in New Orleans between plaintiff and defendant, Wallis, during the week-end of April 20, 1956, at which meeting defendant, Wallis, attempted unsuccessfully to induce plaintiff to reduce his interest in the pending lease applications. Defendant, Wallis, through Harry M. Edelstein, Esq., by letter dated July 30, 1956 to the Director of the Bureau of Land Management, denied that the plaintiff (his joint adventurer in this enterprise to obtain the issuance of a lease or leases covering this acreage in Townships 24 and 25 South, Range 30 East, Louisiana Meridian, Plaquemines Parish, Louisiana) has an undivided one-third (⅓) interest in the Public Lands Oil and Gas Lease Application BLM 042017 but avers that plaintiff's interest is limited to Acquired Lands Applications BLM A-037435 through BLM A-037439.

VII.

On December 18, 1958, effective as of January 1, 1959, the Secretary of the Interior issued a Public Lands Oil and Gas Lease to defendant, Wallis, pursuant to Public Lands Application BLM 042017 covering the lands referred to in Article III hereof. Plaintiff has made demand on defendant, Wallis, to assign to plaintiff his one-third (⅓) interest in said lease but defendant, Wallis, has ignored plaintiff's demand.

[fol. 7] VIII.

Defendant, Wallis, while still on agreeable terms with his joint adventurer, the plaintiff, advised plaintiff on February 8, 1955, by letter, that he was negotiating with defendant, Pan-American (then known as Stanolind Oil and Gas Company) for a trade concerning the then existing Acquired Lands Applications described in Article III above, but that he had reached no agreement with the defendant, Pan-American. Defendant, Wallis, advised plaintiff on March 8, 1955 that the defendant, Pan-American had offered him a consideration of One Hundred ($100.00) Dollars per acre, plus a twenty-five (25%) per cent overriding royalty covering the 826.87 acres of land in the Acquired Lands Applications BLM A-037435, BLM A-037436, BLM A-037437, BLM A-037438 and BLM A-037439. Defendant, Wallis, further advised the plaintiff on March 29, 1955 that he had not made a deal with the defendant, Pan-American. The plaintiff has recently received a copy of an option agreement between the defendant, Wallis, and the defendant, Pan-American (then known as Stanolind Oil and Gas Company), dated March 3, 1955, by which defendant, Wallis, granted to defendant, Pan-American, the right and option, at defendant, Pan-American's election, to acquire any and all oil and gas leases which may be issued to defendant, Wallis, his heirs and assigns, under and by virtue of the Acquired Lands Applications BLM

A-037435 through BLM A-037439. The consideration to Wallis for these rights was Eight Thousand Three Hundred ($8,300.00) Dollars in cash, plus a one-eighth (⅛) [fol. 8] overriding royalty which, at the election of defendant, Wallis, could be paid in one of the following methods:

(a) Ninety Dollars ($90.00) per acre for each acre covered by the leases assigned; or

(b) the reservation in Wallis of a production payment in the amount of Ninety Dollars ($90.00) per acre for each acre covered by the leases assigned, payable out of one-thirty-second of eight-eighths (1/32 of 8/8); or

(c) a combination of cash consideration and production payments out of one-thirty-second of eight-eighths (1/32 of 8/8) at the election by Wallis, which shall total ninety Dollars ($90.00) per acre for each acre covered by the leases assigned.

A copy of this option agreement has been recorded in the conveyance records of the Parish of Plaquemines (C.O.B. No. 212, Fol. 359) on January 16, 1959. Plaintiff avers that the aforesaid option does not affect his undivided one-third (⅓) interest in Public Lands Lease BLM 042017, which has issued to defendant, Wallis, and defendant, Pan-American avers that its option does affect plaintiff's undivided interest in said lease.

IX.

Plaintiff avers that he has a one-third (⅓) interest in Public Lands Lease BLM 042017 issued to defendant, [fol. 9] Wallis, his joint adventurer, by the Secretary of the Interior on December 18, 1958, effective as of January 1, 1959, and that the defendant, Wallis, has failed and refused to formalize by assignment plaintiff's undivided one-third (⅓) interest in these leases. Plaintiff avers that the

option given by the defendant, Wallis, to the defendant, Pan-American, was executed without his knowledge and consent and further that defendant, Wallis, withheld from plaintiff knowledge that this option agreement had been executed by defendant, Wallis. Plaintiff avers that defendant, Wallis, did, in fact, advise him that negotiations with defendant, Pan-American, looking to the consummation of an option agreement similar to the existing one but with better terms, had reached a stalemate and had been broken off. Plaintiff contends that by virtue of the contrary contentions concerning the plaintiff's interest in Federal Lease BLM 042017, as a result of the agreement between plaintiff and defendant, Wallis, dated December 27, 1954, an actual and bona fide controversy exists between the plaintiff and the defendant, Wallis, as to whether or not the plaintiff has an undivided one-third (⅓) interest in Public Lands Lease BLM 042017 covering the lands comprising 826.87 acres in Townships 24 and 25 South, Range 30 East, Louisiana Meridian, Plaquemines Parish, Louisiana, and the rights of plaintiff and defendant, Wallis, under the aforesaid agreement, dated December 27, 1954, can be determined only by declaratory judgment. Likewise, an actual and existing and bona fide controversy exists between the [fol. 10] plaintiff and the defendant, Pan-American, as to whether or not Pan-American's option affects plaintiff's undivided interest in Public Lands Lease BLM 042017.

Wherefore, plaintiff, Patrick A. McKenna, prays for a declaratory judgment declaring that he has an undivided one-third (⅓) interest in Federal Oil and Gas Lease BLM 042017, issued to defendant, Floyd A. Wallis, by the Secretary of the Interior on December 18, 1958, effective as of January 1, 1959.

Plaintiff prays further for a declaratory judgment determining his rights and the rights of the defendant, Pan-American, under the option agreement entered into between the defendant, Wallis, and the defendant, Pan-American, on March 3, 1955.

Plaintiff further prays for such other and further relief as to this court may seem just and proper, in addition to the costs and disbursements of this action.

Philip R. Collins, MacCracken, Collins & Whitney, One Thousand Connecticut Avenue, Washington, D. C.;

Edmond G. Miranne, Richards Building, New Orleans 12, Louisiana;

Attorneys for Plaintiff.

Lee C. Grevemberg, Richards Building, New Orleans 12, Louisiana, Of Counsel.

[fol. 10a]

EXHIBIT A TO COMPLAINT

FLOYD A. WALLIS
OIL LEASES–ROYALTIES
CARONDELET BUILDING
NEW ORLEANS 12, LA.

CANAL 8706

Dec. 27, 1954

Mr. Patrick McKenna
One Scott Circle
Washington, D. C.

RE: BLM-A-037435; 037436; 037437;
037438; 037439
SOUTHWEST PASS APPLICATIONS

Dear Mr. McKenna:

The above captioned serialized numbers represent numbers assigned to oil and gas lease applications made by me to the Bureau of Land Management, Department of Interior, covering certain lands in Plaquemines Parish, Louisiana. These applications were filed on June 2, 1954.

This letter is written to confirm the fact that you have a ⅓ undivided interest in the above captioned oil and gas lease applications and that your ⅓ interest, of course, covers such lease or leases as may be issued to me under these captioned applications, it being understood, however, that all dealings in connection with these leases shall be at my sole discretion and direction.

If this correctly represents our understanding in this matter, I will appreciate if you will sign the copy of this letter in the place provided in the lower left corner and return same to me so that I may complete my file herein.

With kindest regards, I remain

Yours sincerely,

/s/ Floyd A. Wallis
Floyd A. Wallis

FAW:bb

APPROVED:

/s/ P. A. McKenna 1-3-55.
P. A. McKenna

[fol. 11]

In United States District Court

Answer of Floyd A. Wallis—Filed May 15, 1959

Now comes Floyd A. Wallis, defendant, and in response to the complaint filed herein by Patrick A. McKenna, shows:

1.

The allegations of the complaint do not state a claim upon which any relief may be granted; and, therefore, this suit should be dismissed.

2.

Categorically answering the allegations of the complaint, this defendant avers:

(a) The allegations of Paragraphs I, II and VII, are admitted; except that plaintiff does not have a one-third interest in this defendant's lease that was issued under Public Domain Lands Application BLM-042017.

(b) The allegations, inferences and conclusions stated in Paragraphs III, IV, V, VI and IX are denied, except as may be hereinafter otherwise specifically admitted.

(c) With respect to Paragraph VIII, this respondent admits the execution of the option agreement referred to therein, but denies that said option agreement covers the lease issued under Public Lands Application BLM-042017 and would show that at the time that this defendant entered into the said option agreement, this defendant had no obligation whatever to plaintiff, the said plaintiff had no right to be consulted in the matter, and that whatever, [fol. 12] if any, right plaintiff may have had in the $8300.00 in cash that was paid in consideration therefor was subject to a final accounting between plaintiff and this defendant.

3.

Further answering said complaint, this defendant would show that prior to January, 1954, he discovered the existence of the 826.87 acres of land in Township 24 and 25 South, Range 30 East, Louisiana Meridian, Parish of Plaquemines, Louisiana, which are referred to in Article III of plaintiff's complaint; that this defendant decided to apply for a mineral lease on the said property in accordance with the Federal Mineral Leasing Act; and that in connection therewith this defendant, on or about March 18, 1954, sought the assistance of plaintiff herein in view of the fact that plaintiff had represented to this defendant that he, plaintiff (1) was fully capable of handling, and qualified to handle, any and all matters that might become involved before the Department of the Interior of the United States of America; (2) was a qualified lawyer having been admitted to the Bar of the State of Oklahoma

and (3) was also qualified to handle litigation in the United States courts, including the United States District Court in the District of Columbia, and all Federal appellate courts before which this matter might be litigated.

4.

This defendant denies that he ever entered into a "joint [fol. 13] venture" with plaintiff for the acquisition of one or more mineral leases on the lands above described.

5.

On the date aforementioned, March 18, 1954, this defendant agreed that if plaintiff would pay ½ of the filing fees on the applications mentioned in the next succeeding paragraph, and would also pay miscellaneous expenses that would accrue in Washington, D. C. in connection with said applications and the prosecution thereof, and would furnish all of the legal and other services that were and would be required in filing and prosecuting said applications in the Department of the Interior of the United States and before the United States District Court for the District of Columbia, as well as any and all Federal appellate courts before which this matter might be litigated, including the resistance of any adverse claims that might be asserted against the property and the said applications, this respondent would give plaintiff a ⅓ interest under any lease or leases which he might acquire under, but only under, the Acquired Lands oil and gas lease applications referred to in the next succeeding paragraph.

6.

This defendant admits that he filed *Acquired* Lands Oil and Gas Lease Applications, numbered BLM A-037435, BLM A-037436, BLM A-037437, BLM A-037438, and BLM A-037439 covering the property hereinabove described. However, this respondent would show that the plaintiff

[fol. 14] performed very little, if any, services in connection with the preparation of said applications, which services were limited to the furnishing of this defendant with information that he requested from time to time, in filing, although belatedly, the said applications after they had been prepared by this defendant without any appreciable assistance from the plaintiff and in keeping this defendant informed, from time to time of certain, if not all, developments.

7.

This defendant had become apprehensive about the inability of the plaintiff to perform the services that he had agreed to perform when the plaintiff delayed the filing of this defendant's said applications from the latter part of March until June 2, 1954, when said applications were actually filed and the plaintiff was unable to give a reasonable excuse for not timely filing said applications.

8.

After filing said applications, and although this defendant was relying upon the plaintiff to guide him in complying with all legal requirements, it was not until on or about August 14, 1954 that plaintiff informed this defendant for the first time that he had to make certain written declarations showing the extent of this defendant's other interests, if any, in other leases on property within the State of Louisiana; and plaintiff's failure to have originally given this defendant this advice further shook this [fol. 15] defendant's confidence in plaintiff.

9.

Notwithstanding his agreement, on March 18, 1954, to pay ½ of the aforementioned filing fee, the plaintiff did not actually reimburse this defendant therefor until on or about January 3, 1955.

10.

On or about December 8, 1954, this defendant discovered for the first time that descriptions (contained in an adverse filing in the Department of the Interior) that had been furnished by the plaintiff in May, 1954, were erroneous and the erroneous descriptions had caused this defendant considerable apprehension, delay and expense in trying to analyze the position of this defendant's adversaries.

11.

On December 20, 1954, the California Company obtained a slant well permit without any opposition from the plaintiff or this defendant; that if the plaintiff had performed the services which this defendant had a right to expect of him, timely opposition to the application for said permit might have been made; and that because of the plaintiff's neglect and delay, it was necessary to move to set aside the permit and to obtain the services of another attorney in an effort to do so, all without any success.

[fol. 16] 12.

Despite the plaintiff's actions, as aforestated, this defendant executed the letter of December 27, 1954 (annexed to the complaint herein) still believing that plaintiff was qualified to handle, and would handle, at no expense to this defendant, all of the matters that might arise before the Department of the Interior and in the U.S. courts in connection with said applications.

However, as soon as the said letter of December 27, 1954, was signed by the defendant and accepted by plaintiff, plaintiff then recommended that one Martin White, an attorney of Washington, D.C., should be employed to handle the said applications before the Department of the Interior, and all matters pertaining thereto. Whereupon, the plaintiff admitted, for the first time, that he was wholly incapable of properly handling said matters.

13.

This defendant first objected to the employment of any other attorney, knowing that the plaintiff had agreed to furnish all said services and had represented himself as being fully capable of doing so. However, when plaintiff stated that Mastin White's services would not cost any more than $500.00 in connection with one specific phase of the work, this defendant reluctantly agreed to the employment of Mastin White and, in connection therewith, agreed to pay ½ of his fees, but only on the condition that plaintiff reduce the ⅓ interest mentioned in the aforesaid letter [fol. 17] of December 27, 1954, and, plaintiff agreed to a reduction, although the specific amount was not actually agreed upon. Finally, when plaintiff refused to make any reduction whatever in the said interest, this defendant refused to pay Mastin White's fees and this defendant is informed that plaintiff actually paid them.

14.

Mastin White finally withdrew from the proceedings before the Department of the Interior of the United States in the latter part of October, or early part of November, 1955; and upon his withdrawing and because of the inadequacies of plaintiff, the need for other counsel was urgent, due, in part to the filing, at about that time, of a slant well application by the Shell Oil Corporation. Whereupon, this defendant went to Washington, D.C. during November, 1955, and, upon the recommendation of plaintiff employed one Harry Edelstein, but before doing so, this defendant advised plaintiff that a new arrangement would be necessary because this defendant could ill afford to give plaintiff what is called for in the letter of December 27, 1954. Whereupon, it was agreed between plaintiff and this defendant that each would advance ½ of the fees which would be payable to Harry Edelstein from time to time, but that plaintiff and this defendant would rearrange the agreement that existed at that time between them.

15.

Plaintiff came to the city of New Orleans in April, 1956, [fol. 18] ostensibly for the purpose of rearranging the agreement that then existed between plaintiff and this defendant, and presumably pursuant to the agreement mentioned in the last preceding paragraph.

However, the plaintiff refused to make an adjustment in the prevailing agreement, although plaintiff admitted that he had not performed his part of the agreement in accordance with the understanding that had been reached and the representations that had been made to this defendant.

16.

This defendant admits that on April 23, 1956, following this defendant's ascertainment of the complete falsity of all of the representations made to this defendant by plaintiff, particularly those representations that are set forth in Paragraph 3 above, this defendant revoked the powers of attorney previously given to the plaintiff and on May 4, 1956 terminated all and whatever relationship this defendant had with the plaintiff, a copy of the letter of revocation dated April 23, 1956 and of the letter of termination dated May 4, 1956 being hereto attached and made part hereof as fully as though copied in extenso.

(a) This respondent would show that all of the factual statements contained in his said letter of May 4, 1956 to plaintiff are true and correct and fully justified the cancellation of this defendant's prior arrangement with the plaintiff; and that as a result of the said letter and the [fol. 19] facts therein stated, the plaintiff does not have the right to an undivided one-third (⅓) interest in (a) the Federal Oil & Gas Lease Applications described in the Letter Agreement dated December 27, 1954, or (b) the Public Lands Application BLM-042017; and that the only right that the plaintiff has is on a quantum meruit basis assuming, but not admitting, that he performed services for this defendant.

17.

While this defendant admits the execution of the letter of December 27, 1954, he would show that at the time that he executed the said document, he was relying upon the abovementioned representations that had been made by the plaintiff and, in view of the fact that there was every reason to anticipate a serious contest in the Department of the Interior of said lease applications, as well as litigation in the United States courts, this defendant was led to believe by plaintiff and believed that in consideration for the said one-third (⅓) interest, the plaintiff would handle any and all matters that might arise in the said department and/or in the said courts with reference to and in connection with said applications, all without the necessity of securing any outside assistance, and on further condition that plaintiff pay one-half of the filing fees due to the Department of the Interior and of the miscellaneous expense items that would accrue, from time to time, in Washington D. C.

This defendant, vehemently denies that he gave, agreed [fol. 20] to give, or would have given plaintiff a one-third (⅓) interest in the said lease applications for "ascertaining and checking the correct description" of the lands involved and for plaintiff's alleged agreement to pay one-half (½) of the filing fees and the first year's rental and thereafter, one-half (½) of the attorney's fees incurred in the prosecution of said applications before the Department of the Interior, etc., as alleged.

(a) This defendant would show that there never was any understanding or agreement from the inception with respect to the payment of costs and fees, except as hereinabove set forth; that the plaintiff did not ascertain the correct description of the lands involved, was incapable of ascertaining such descriptions although he led this defendant to believe that he was fully capable of doing so and that this respondent, himself, secured the correct descrip-

tions by employing a competent engineer who, with the aid of the records that were available to him on file with the United States Engineers in New Orleans, prepared said descriptions, all without any help from the plaintiff.

(b) There was likewise no agreement or understanding from the inception with respect to the payment of attorney's fees; and this respondent would show that from the inception, the plaintiff obligated himself to perform all such services, and there were to be no attorneys' fees payable by this respondent inasmuch as the one-third (⅓) interest mentioned in the letter of December 27, 1954, was partly, and mainly, in consideration for such services which [fol. 21] the plaintiff represented himself as being able and willing to render.

18.

This defendant denies that the plaintiff had anything whatever to do with this defendant's filing of the *Public Lands* Application, more particularly identified as Public Lands Application BLM-042017; and this defendant would show that the plaintiff has no agreement, written or otherwise, under which he is entitled to receive under the letter agreement of December 27, 1954, or otherwise, any interest in any lease or leases issued in connection with the said application. In this connection, this defendant would specifically show that the lease which he holds was issued under, and solely under, his said Public Lands Application BLM-042017; that said lease is subject to the provisions of La. R.S. 9:1105 which is specially and specifically pleaded; and that the plaintiff has no right to prove any title to or interest in said lease by oral statements and/or oral evidence, and this defendant, therefore, specifically pleads the above statute, and the jurisprudence of the Louisiana Supreme Court interpreting said statute, in bar of plaintiff's attempt to prove any title to or interest in said lease.

19.

This respondent would further show that the plaintiff does not have, and this Honorable Court may not recognize in plaintiff, rights in this respondent's lease, for the further [fol. 22] reason that the plaintiff does not hold from this respondent an assignment or transfer that conforms to the requirements of 30 U.S. Code 187(a), and of 43 C.F.R. 192.140, 192.141 and 192.142. These statutory provisions and the regulations of the Department of the Interior of the United States, with respect thereto, are hereby specifically pleaded against plaintiff's alleged rights.

20.

This defendant denies that there ever existed a joint venture between him and plaintiff; and this defendant would show that the only relationship that ever existed between this defendant and plaintiff was that of attorney and client and/or employer and employee in that this defendant engaged plaintiff's services to handle this defendant's case in the Department of the Interior of the United States and before the Federal Courts, if court litigation should ensue, all as hereinabove set forth.

21.

The alleged agreement between this defendant and the Pan-American Petroleum Corporation does not pertain to the lease that this respondent now holds under Public Lands Application BLM-042017; and that the letter agreement of December 27, 1954 likewise does not pertain to said Public Lands Lease Application.

Alternative Plea

In the alternative, and only in the event that this Honorable Court should hold that plaintiff is entitled to a one-third (⅓) interest in the lease issued under Public

[fol. 23] Lands Lease Application BLM-042017 (which is denied) then, and in such event, this defendant would show that he has thus far expended, the full sum of $40,173.61 in prosecuting the said matter, the same being itemized as follows:

Net fees paid Harry M. Edelstein from Jan. 1956 through April 30, 1959	$32,846.50
Amount paid B.M. Dornblatt and Associates, Inc. for engineering services	525.00
Amount paid F.C. Gandolfo, Surveyor	3,704.75
Amount paid Southern Blue Print Company	319.88
Amount paid Rogers & Seglund, Geologists	1,268.27
Amount paid F. & A. Map Co.	208.64
Net amount paid Department of the Interior of the U.S. over and above ½ paid by plaintiff and special costs in connection with the preparation of applications	1,300.58
	$40,173.61

and this defendant is, therefore, entitled to reimbursement from the plaintiff for one-half (½) thereof, or the full sum of $20,086.80, with interest at 5% per annum from the respective disbursement dates of said items, until paid.

Wherefore, this defendant, Floyd A. Wallis, prays that the plaintiff's suit be dismissed at his cost; and in the alternative this defendant would show that if the court [fol. 24] should hold that plaintiff is entitled to participate

in the lease issued under said Public Lands Lease Application BLM-042017, then this defendant is entitled to a judgment against the plaintiff for the sum of $20,086.80, with 5% interest as recited above.

And for such other and further relief as to this court may seem just and proper.

C. Ellis Henican, Attorney for Respondent, 1112 Hibernia Bldg., New Orleans 12, La.

Of Counsel: Henican, James & Cleveland.

IN UNITED STATES DISTRICT COURT

ANSWER OF PAN-AMERICAN PETROLEUM CORPORATION—Filed June 1, 1959

Defendant, Pan American Petroleum Corporation, in response to the complaint filed herein by Patrick A. McKenna, says:

I.

This defendant admits the allegations of Paragraph 1 of the complaint.

II.

The allegations of Paragraph 2 are admitted.

III.

This defendant is without knowledge of the true facts affecting the controversy between McKenna and Wallis [fol. 25] and, therefore, the allegations of Paragraph 3 are denied except that this defendant admits that the purported letter agreement dated December 27, 1954 which is made part of the Complaint as Exhibit "A" was executed by the parties thereto but denies that said agreement

created or could have created any rights which McKenna claims would or could affect this defendant.

IV.

For lack of sufficient information to justify a belief this defendant denies the allegations of Paragraph 4.

V.

For lack of sufficient information to justify a belief this defendant denies the allegations of Paragraph 5.

VI.

For lack of sufficient information to justify a belief this defendant denies the allegations of Paragraph 6.

VII.

This defendant admits the allegations of Paragraph 7 but denies that McKenna has any rights in and to Public Lands Application BLM 042017 which could affect this defendant.

VIII.

This defendant admits the execution of the Option Agreement with Wallis dated March 3, 1955 and admits that said Option Agreement covers the lease issued under Public Lands Application BLM 042017, but denies that McKenna's rights, if any he has, might or could affect this defendant's right under the Option Agreement of March 3, 1955 with [fol. 26] Wallis to acquire all the right, title and interest of Wallis in and to Public Lands Lease BLM 042017, for the consideration expressed in said agreement of March 3, 1955.

IX.

For lack of sufficient information to justify a belief this defendant denies all the allegations of Paragraph 9 except

that McKenna knew Wallis was negotiating with this defendant looking to the consummation of an option agreement which in fact was executed between this defendant and Wallis on March 3, 1955 as aforesaid.

X.

Further answering said complaint, this defendant avers that on the face of the letter agreement of December 27, 1954 between Wallis and McKenna, the defendant Wallis clearly and unequivocally reserved the right unto himself to make all dealings in connection with any lease affected by the letter agreement of December 27, 1954 at his sole discretion and direction, and Wallis was under no obligation whatsoever to McKenna to consult McKenna with respect to the execution of the Option Agreement with Pan American dated March 3, 1955, and this defendant further avers that any rights which McKenna has or may have under the said agreement of December 27, 1954 are limited and restricted to a one-third (⅓) undivided interest in whatever residual rights Wallis has or may have upon [fol. 27] and after his assignment to this defendant of Public Lands Lease BLM 042017 pursuant to the Option Agreement of March 3, 1955.

XI.

Alternatively, this defendant would show that although McKenna in Paragraph 9 of his complaint had judicially admitted "that defendant, Wallis, did, in fact advise him (McKenna) that negotiations with defendant, Pan American, looking to the consummation of an option agreement similar to the existing one but with better terms, had reached a stalemate and had been broken off" McKenna did not notify this defendant, nor did this defendant know of the existence of the purported agreement of December 27, 1954 and this defendant would show that Wallis represented to this defendant contemporaneously with the

execution of the Option Agreement of March 3, 1955 that Wallis was the sole owner of any and all rights affecting the pending lease applications and therefore McKenna having permitted Wallis to negotiate with this defendant "looking to the consummation of an option agreement" and this defendant having relied on the apparent right and authority of Wallis to negotiate the said option agreement of March 3, 1955 McKenna is forever estopped from denying the right and authority of Wallis to execute said agreement of October 3, 1955 with this defendant.

XII.

This defendant shows that Wallis has refused to perform his obligations under the Option Agreement of March [fol. 28] 3, 1955 to assign, transfer and deliver to this defendant all the right, title and interest of Wallis in and to Public Lands Lease BLM 042017 and heretofore this defendant has filed a civil action against Wallis under the number 8937 of the docket of this court for specific performance of the said Option Agreement of March 3, 1955, said suit being still pending and by reference is made part hereof.

Wherefore, defendant, Pan American Petroleum Corporation, prays that the plaintiff's suit be dismissed at his cost, and, in the alternative, that if the court should hold that plaintiff has any rights under the purported agreement dated December 27, 1954 or otherwise, then, that any such rights do not affect in any manner whatsoever the rights of Pan American Petroleum Corporation under the Option Agreement dated March 3, 1955 but are limited and restricted to participation by McKenna in any residual rights which Wallis has or may have under said Option Agreement of March 3, 1955, and defendant further prays that said Option Agreement of March 3, 1955 be recognized and enforced with respect to Public Lands Lease BLM 042017 as prayed for in the pending action by Pan American Petroleum Corporation against Wallis under the number 8937 of the docket of this court.

This defendant further prays for such other and further relief as in law and equity this court may deem just and proper.

Percy Sandel, William P. Hardeman, Cobb & Wright, By Lloyd J. Cobb, Attorneys for Defendant, Pan American Petroleum Corporation.

[fol. 153]

IN UNITED STATES DISTRICT COURT

AMENDED ANSWER OF FLOYD A. WALLIS—Filed February 1, 1961

Comes Now, Floyd A. Wallis, defendant in the above numbered and styled Civil Action No. 8904, and subject to leave of court amends his answer, as heretofore filed therein, in the following particulars, to-wit:

21.

In Article III of the complaint, plaintiff alleges upon a letter agreement dated December 27, 1954, same being annexed to the complaint and marked "Exhibit A", and defendant shows that this agreement provided in part with reference to such lease or leases as may be issued to Wallis "that all dealings in connection with these leases shall be at my sole discretion and direction." Despite the foregoing, [fol. 154] and without this defendant's knowledge and consent, defendant shows that plaintiffs did by instrument dated May 1, 1956, enter into a contract and agreement with one Samuel Nakasian, which contract and agreement represented that plaintiff "owns a one-third undivided interest in lands covered by applications for mineral leases," then referring to the Acquired Lands Oil and Gas Lease Applications referred to in Article III of the complaint. Said agreement further provided that plaintiff "does hereby grant and convey to (Nakasian) fifteen per cent (15%) of his one-third interest, equal to but not less than five per cent (5%) undivided share in all title, rights and interest in the

above-described lands, so that henceforth, (Nakasian) is secure in his possession and right to a five per cent (5%) undivided share in any and all rights, title and interest to the minerals on the above-described lands as, if and when acquired by" (plaintiff). This defendant shows that to the extent that this plaintiff has a claim to the lease, BLM-042017, if any, (which is denied) then this defendant shows that the conveyance executed by the said plaintiff in favor of Nakasian constituted a breach and violation of the terms and provisions of any agreement between this defendant and said plaintiff, and, without limiting the generality hereof, particularly the clause hereinabove quoted from the letter agreement of December 27, 1954, and defendant shows that plaintiff, having breached the agreement at that time and as a result thereof he being in default, is thereby [fol. 155] prevented and precluded from prosecuting this action, and particularly, he having breached the agreement, he cannot now maintain an action based upon said agreement.

22.

Since having filed his answer herein, this defendant's deposition has been taken and, in preparation therefor, this defendant had occasion to review his file and other related documents in connection with this litigation, and finds that the letter dated May 4th, 1956, which is referred to in Article 16 of his answer and which letter was made a part thereof, contained certain erroneous statements, and accordingly this defendant desires to amend Article 16 of his complaint, by deleting therefrom said letter of May 4th, 1956, and thus amend this Article of his complaint to read as follows:

"16.

"This defendant admits that on April 23rd, 1956, following this defendant's ascertainment of the complete falsity of all of the representations made to this defendant by plaintiff, particularly those representations

that are set forth in Paragraph 3 above, this defendant revoked the powers of attorney previously given to the plaintiff and, under letter of the same date addressed to plaintiff, so advised plaintiff of his action, and, following the conference referred to in Paragraph 15, defendant by letter dated May 4th, 1956, terminated [fol. 156] all and whatever relationship this defendant had with the plaintiff, a copy of the letter of revocation of the powers of attorney, dated April 23rd, 1956, being hereto attached and made a part hereof as fully as though copied in extenso.

(a) This respondent would show that certain of the factual statements contained in his said letter of May 4th, 1956, to plaintiff are true and correct and fully justified the cancellation of this defendant's prior arrangement with the plaintiff; and that as a result of the said letter and certain of the facts therein stated, plaintiff does not have the right to an undivided one-third interest in (a) the Federal Oil and Gas Lease Applications described in the letter agreement dated December 27th, 1954, or (b) the Public Lands Application BLM-042017; that the only right that the plaintiff has is on a quantum meruit basis, assuming, but not admitting, that he performed services for this defendant."

23.

Since the filing of this suit, Floyd A. Wallis has had additional costs and expenses and, therefore, wishes to amend his original alternative plea which follows Paragraph 21 of his original responsive pleadings filed in Civil Action No. 8904, so that henceforth said alternative plea shall read as follows:

[fol. 157] Alternative Plea

In the alternative, and only in the event that this Honorable Court should hold that plaintiff is entitled to a one-

third interest in the lease issued under Public Lands Lease Application BLM-042017 (which is denied), then, in such event, this defendant would show that he has now expended $69,022.25 in prosecuting the said matter, the same being itemized as follows:

Travel expenses incurred in the years 1955, 1959 and 1960	$ 1,382.31
Telephone expense, including long distance calls accrued during 1954 through October 31, 1960	2,139.42
Net fees paid Harry M. Edelstein, Attorney, Washington, D. C., from January 19, 1956 thru October 31, 1960	48,660.07
Amount paid for professional services including engineering, surveying and geology, the amounts having accrued in 1954, 1956, 1957, 1958 and 1960	11,780.17
Cost of obtaining reproduction of documents, including electrical logs, etc.	975.94
Miscellaneous expenses incurred in 1954, 1955, 1956, 1958 and 1959	4,084.34

and, Floyd A. Wallis is, therefore, entitled to reimbursement from Patrick A. McKenna for one-half thereof, or the full sum of .....$34,511.12, with interest at 5% per annum from the respective disbursement dates of said items, until paid. Defendant, Floyd A. Wallis, attaches hereto and makes part hereof for con- [fol. 158] sideration as fully as though copied herein in extenso, complete detailed itemized statements in support of the expenditures herein above set forth.

Moreover, in order to properly protect the lease issued under Public Lands Lease Application BLM-042017, and particularly in connection with the efforts by the Shell Oil

Company and The California Company, and others, to set aside the said lease and the efforts of the State of Louisiana, with the cooperation of its mineral lessees, to claim title to the property covered by the said lease and thereby render this defendant's said lease null and void and ineffective and in connection with the protection of the leased premises against drainage, this defendant has engaged the professional services of Colles C. Stowell, Geologist, Henican, James & Cleveland and C. Ellis Henican, Attorneys at Law; that said parties have performed, are performing, and will continue to perform, extensive services in connection with the protection of said lease; that this defendant has already obligated himself to pay said parties their fees well in excess of $50,000.00; that the services and fees are indispensable to the protection of this defendant's said lease and the property that is the subject thereof; and that if Patrick A. McKenna is successful in his effort to be recognized as the owner of an undivided one-third interest in the said lease, he should be further required to reimburse this defendant for one-half of the total fees that are, and will be, payable to Colles C. Stowell, Henican, James & Cleveland and C. Ellis Henican.

[fol. 159] 24.

Floyd A. Wallis, defendant, amends the prayer of his original responsive pleadings so that, as amended, said prayer will henceforth read as follows:

Wherefore, this defendant, Floyd A. Wallis, prays that the suit of Patrick A. McKenna (Civil Action No. 8904) be dismissed at his cost; and, in the alternative, Floyd A. Wallis, this defendant, would show that if the court should hold that Patrick A. McKenna is entitled to participate in the lease issued under said Public Lands Lease Application BLM-042017 to the extent of an undivided one-third thereof, or therein, then this defendant, Floyd A. Wallis, is entitled to a judgment against Patrick A. McKenna, for the sum of $34,511.12, with 5% interest as recited above; that Floyd A.

Wallis is further entitled to a judgment against plaintiff for one-half of the full fees that are, and will be, payable to Colles C. Stowell, Henican, James & Cleveland and C. Ellis Henican, as hereinabove set forth; and that Floyd A. Wallis is further entitled to a judgment against Patrick A. McKenna for one-half of all of the fees, costs and expenses that may be incurred by him from and after October 31, 1960, which said costs, expenses and fees will be inevitable in the prosecution and defense by Floyd A. Wallis of the lease and property.

And for such other and further relief as to this court may seem just and proper.

Wherefore, this defendant, Floyd A. Wallis, prays that [fol. 160] this amended answer be allowed, and that there be judgment herein in his favor as prayed for in his original answer, as amended.

Horace M. Holder, 1300 Beck Bldg., Shreveport, Louisiana;

C. Ellis Henican, 1112 Hibernia Bldg., New Orleans, La.;

By: C. Ellis Henican,
Attorneys for Floyd A. Wallis.

[fol. 189]

IN UNITED STATES DISTRICT COURT

ORDER THAT NO PAROL EVIDENCE SHALL BE ADMITTED IN C.A. #8904 TO ESTABLISH PLAINTIFF'S INTEREST IN THE REAL PROPERTY; ORDER THAT PAROL EVIDENCE MAY BE ADMITTED IN BOTH CONSOLIDATED ACTIONS TO SHOW WHETHER THE INTEREST CONVEYED ATTACHES TO THE LEASE GRANTED, ETC.; AND ORDER THAT NO PAROL EVIDENCE SHALL BE ADMITTED IN C.A. #8937 TO PROVE PLAINTIFF'S EXERCISE OF ITS OPTION—July 20, 1961

Wright, J:

It appearing that questions relating to the admissibility of parol evidence would arise on the trial of these cases, the court ordered the parties to file briefs covering these questions before the trial. Having considered the trial [fol. 190] briefs filed, the court is now ready to rule.

1. It Is Ordered that no parol evidence shall be admitted in Civil Action No. 8904 to establish plaintiff's interest in the real property, whether by way of joint venture or otherwise.

2. It Is Further Ordered that parol evidence may be admitted in both consolidated actions to show whether the interest conveyed, if any, by the written agreements, attaches to the lease granted under the public domain lands application filed with the Department of the Interior.

3. It Is Further Ordered that no parol evidence shall be admitted in Civil Action No. 8937 to prove plaintiff's exercise of its option under the agreement of March 3, 1955.

J. S. W.

Authorities

1. La. C.C., Art. 2275; *Slack* v. *DeSoto Properties,* 221 La. 384, 59 So.2d 428, 431-432.

2. La. C.C., Arts. 1949, 1956; *Plaquemines Oil & Development Co.* v. *State,* 208 La. 425, 23 So.2d 171, 174; *Gulf*

Refining Co. v. *Garrett,* 209 La. 674, 25 So.2d 329, 338-339 (on rehearing); *Simmons* v. *Hanson,* 228 La. 440, 82 So.2d 757, 758-759; *Rosenthal* v. *Gautier,* 224 La. 341, 69 So.2d 367, 369.

3. La. C.C., Art. 2462; *Barchus* v. *Johnson,* 151 La. 985, 92 So. 566; *Louisiana State Board of Education* v. *Lindsay,* 227 La. 553, 79 So.2d 879, 885; *McVay* v. *Swift,* 5 Cir., 91 F.2d 208, 209.

The rulings announced in the first and third paragraphs [fol. 191] of the order are predicated on the consistent holding of the Louisiana Supreme Court that, for the purpose of the statute of frauds, La. C.C., Arts. 2275, 2440, 2462, the provisions of La. R.S. 9:1105 require that "oil and gas and other mineral leases, and contracts applying to and affecting such leases" be treated as "real rights and incorporeal immovables". *Arkansas Louisiana Gas Co.* v. *R. O. Roy & Co.,* 196 La. 121, 198 So. 768; *Davidson* v. *Midstates Oil Corporation,* 211 La. 882, 31 So.2d 7; *Wier* v. *Glassell,* 216 La. 828, 44 So.2d 882; *Acadian Production Corp. of Louisiana* v. *Tennant,* 222 La. 653, 63 So.2d 343. However difficult it may be to square these holdings with others by the same court in which, for other purposes, a mineral lease is characterized as emphatically *not* a real right, see, e.g., *Reagan* v. *Murphy,* 235 La. 529, 105 So.2d 210; *Tinsley* v. *Seismic Explorations, Inc.,* 239 La. 23, 117 So.2d 897; *Hodges* v. *Long-Bell Petroleum Company,* 240 La. 198, 121 So.2d 831 (on rehearing); *Harwood Oil & Mining Company* v. *Black,* 240 La. 641, 124 So.2d 764, this court must accept them as announcing the substantive law of Louisiana.

Since the question is basic to the very existence of a cause of action and may significantly affect the result, the Rule of Decisions Act, 28 U.S.C. §1652, as interpreted in *Erie* v. *Thompkins,* 304 U.S. 64, and *Guaranty Trust* v. *York,* 326 U.S. 64, compels adherence to the local law and overrides the more liberal policy of F.R.Civ.P., Rule 43(b). *Macias* v. *Klein,* 3 Cir., 203 F.2d 205; cf. *Kossick* v. *United*

Fruit Co., 365 U.S. 731. See also, *Zacharie* v. *Franklin*, [fol. 192] 37 U.S. (12 Peters) 151; *Grafton* v. *Cummings*, 99 U.S. (9 Otto) 100; *Moses* v. *Lawrence County Bank*, 149 U.S. 298.

J. S. W.

* * * * * * *

[fol. 195]

Civil Action No. 8937

PAN AMERICAN PETROLEUM CORPORATION, a corporation,

versus

FLOYD A. WALLIS.

COMPLAINT OF PAN AMERICAN PETROLEUM CORPORATION—
Filed April 13, 1959

I.

Plaintiff, Pan American Petroleum Corporation (formerly Stanolind Oil & Gas Co.), hereinafter referred to as Pan American, is a corporation organized and existing under the laws of the State of Delaware and duly qualified and doing business as a foreign corporation under the laws of the State of Louisiana.

II.

Defendant, Floyd A. Wallis, hereinafter referred to as Wallis, is a citizen of the Parish of Orleans, State of Louisiana.

III.

The matter in controversy herein exceeds, exclusive of interest and costs, the sum of $10,000.00.

IV.

On March 3, 1955 Pan American and Wallis entered into a written agreement, a copy whereof is hereunto annexed and made a part hereof, and marked P-1 for identification herewith, the said agreement being hereinafter referred to as "the option agreement."

V.

The said option agreement granted to Pan American the right and option at Pan American's election to acquire any and all oil and gas leases which Wallis might obtain covering the lands described more particularly in the option agreement and being the identical lands described in then pending applications which Wallis had filed on June 2, 1954 with the Bureau of Land Management and to which serialized numbers BLM-A 037435, BLM-A 037436, BLM-A 037437, BLM-A 037438 and BLM-A 037439 had been assigned.

[fol. 196] VI.

During and contemporaneously with the confection and execution of the option agreement both parties thereto recognized and understood that the principal motive, objective and consideration of the option agreement were the acquisition by Wallis from the Bureau of Land Management of an oil and gas lease or leases on the specific land described in the option agreement irrespective whether said lands technically were acquired lands or public lands within the meaning of the appropriate Federal Leasing Statutes.

VII.

In Article II of the option agreement Wallis agreed "to make diligent efforts to acquire leases on, to acquire the right to lease all lands described in the above referred to applications, and to obtain the issuance of leases to him covering all of said lands."

VIII.

When Wallis filed the aforesaid applications on June 2, 1954 conflicting applications were pending before the Bureau of Land Management, Department of Interior in the name of Henry S. Morgan, whose applications had been filed on January 27, 1954 on Forms for Acquired Lands and also Public Lands.

IX.

By reason of the Wallis applications and the pendency of the conflicting Morgan applications for the identical lands, as either acquired lands or public lands, Wallis after conferences with responsible officials of the Bureau of Land Management, determined to file and did file on March [fol. 197] 8, 1956 a Public Lands Application with the Bureau of Land Management covering the identical land described in the option agreement and the Acquired Lands Application of Wallis then pending.

X.

The filing by Wallis of the said Public Lands Application had as its purpose the acquisition of a lease on the described lands whether the said lands were determined ultimately to be acquired lands or public lands.

XI.

Contemporaneously with the signing of the option agreement of March 3, 1955, Wallis advised plaintiff that Henry S. Morgan had filed not only an application for lease on acquired lands, but also an application for lease on public lands, and in line with his obligations "to make diligent efforts to acquire leases," Wallis inquired whether plaintiff thought he should do likewise. Plaintiff advised Wallis that the question whether or not an application for lease on public lands should be filed by him was one to be determined by Wallis and his advisors in Washington, both Wallis and

plaintiff considering it an integral part of the consideration for the option agreement for Wallis to make such a determination in the mutual interests of both parties and for Wallis to take any other additional action which might be necessary or desirable to achieve the objectives of the option agreement "to acquire the right to lease all lands described in the above referred to applications."

XII.

The filing by Wallis of the Public Lands Application aforementioned was without the knowledge of Pan Ameri- [fol. 198] can but actually was in strict conformity with the obligations of Wallis to obtain the issuance of an oil and gas lease or leases on the said lands, whether said lands were acquired lands or public lands.

XIII.

On December 18, 1958, effective as of January 1, 1959, the Secretary of the Interior issued a Public Lands Oil and Gas Lease to Wallis pursuant to Public Lands Application BLM-042017 which had been filed by Wallis on March 8, 1956 covering the identical lands described in the option agreement with Pan American.

XIV.

Wallis did not advise Pan American of the issuance of the aforesaid Public Lands Oil and Gas Lease on December 18, 1958 and Pan American obtained independent knowledge thereof long after the issuance of said lease.

XV.

Between March 3, 1955 when the option agreement was signed and the time when Pan American learned of the issuance of the said Public Lands Oil and Gas Lease, Wallis was contacted by Pan American at regular intervals of approximately 90 days and, additionally, Wallis and Pan

American's representatives throughout said period discussed the status of the lease application of Wallis and Wallis never indicated to Pan American at any time during this entire period that he had filed a Public Lands Application in addition to the Acquired Lands Application, nor did he indicate that there was any question whatsoever that Pan American had the right under the option agreement to acquire any lease which he might in either case obtain on the said lands.

[fol. 199] XVI.

The aforesaid applications filed in the name of Henry S. Morgan prior to the filing of the application by Wallis created a controversy which resulted in a decision by the Director of the Bureau of Land Management on June 5, 1957 which Henry S. Morgan appealed to the Secretary of the Interior and which appeal was decided on August 27, 1958 in favor of Wallis, a copy of said decision of the Interior Department (65 ID., No. 9) being attached hereto and made a part hereof.

XVII.

In the aforesaid controversy Wallis failed to take a definitive position on whether the lands applied for by him are of the one type or the other, i.e., whether acquired lands or public lands and in the said decision of the Interior Department it was decided that Wallis was willing to accept a lease under either statute.

XVIII.

The Director of the Bureau of Land Management in the decision dated June 5, 1957 held that the lands involved were leasable only as public lands and as Wallis was maintaining both types of offers Wallis avoided insisting in said proceeding that the Director's determination was in error.

XIX.

Since neither Morgan nor Wallis took a definite position on whether the lands were acquired or public lands, the Interior Department in the said decision of August 27, 1958 saw no reason to disturb the Director's finding that the lands are leasable under the Mineral Leasing Act of 1920, as amended, and not under the Mineral Leasing Act for [fol. 200] Acquired Lands, the failure of Wallis to take a definitive position conforming strictly to his obligations under the option agreement "to make diligent efforts to acquire leases on, to acquire the right to lease all lands described in the above referred to applications, and to obtain the issuance of leases to him covering all of said lands." Whether said lands were acquired lands or public lands by statute, and the conduct of Wallis aforesaid coupled with all other circumstances delineated herein constituted a contemporaneous construction of the option agreement consonant with the declared intention of the parties thereto upon its execution.

XX.

Any construction of the option agreement which would permit Wallis to retain the lease of December 18, 1958 for his personal benefit is in conflict with and violative of the obligations undertaken by Wallis in the option agreement to make diligent efforts to acquire leases on the said lands without reference to the technical type or character of the said lands and Wallis in equity and good conscience is estopped from claiming the fruits of the after-acquired lease of December 18, 1958 in contravention of his obligations under the option agreement and estoppel in the premises is hereby specially averred.

XXI.

The consideration paid to Wallis for the option agreement was $8,300.00 cash and Wallis agreed to notify Pan American in writing when a lease or leases were issued to him and Pan American had and has 15 days after receipt

of such notice to advise Wallis whether it elects to acquire said lease or leases from him. Upon Pan American's elec- [fol. 201] tion to acquire any said lease or leases, Wallis in said option agreement is obligated to transfer within 10 days thereafter all of his right, title and interest in and to said leases reserving to himself an overriding royalty interest, (subject to reduction as in said option agreement provided) equal to one-eighth of eight-eights (1/8 of 8/8) for a consideration which, at the election of Wallis, shall be either (a) Ninety Dollar ($90.00) per acre for each acre covered by the leases assigned, or (b) the reservation by Wallis of a production payment in the amount of Ninety Dollars ($90.00) per acre for each acre covered by the leases assigned, payable out of one-thirty-second of eight-eights (1/32 of 8/8), or (c) a combination of cash consideration and production payments out of one-thirty-second of eight-eights (1/32 of 8/8) at the election of Wallis, which shall total Ninety Dollars ($90.00) per acre for each acre covered by the leases assigned.

XXII.

Wallis has never notified Pan American in writing of the issuance to him of Public Lands Lease BLM 042017 and notwithstanding Pan American's demand upon him to do so Wallis has refused orally to perform his obligations under the option agreement.

XXIII.

Pan American desires to exercise its rights under the option agreement, is ready, able and willing to perform its obligations thereunder, and is entitled to specific performance thereof by Wallis.

XXIV.

Since the filing of the aforedescribed applications by Wallis, producing oil wells have been brought in on adjoining lands.

[fol. 202] XXV.

The lands embraced by Public Lands Lease BLM 042017 issued to Wallis are currently suffering drainage from wells of others on lands immediately adjacent thereto and Pan American and the United States of America have sustained and are continuing to sustain heavy losses from such drainage as the proximate results of the failure and refusal of Wallis to comply with his obligations under the option agreement, Pan American hereby specially averring that to Wallis' knowledge Pan American has been willing and is now ready to take steps immediately to prevent the further drainage thereof, and Pan American reserves all its rights against Wallis for losses which it has suffered or may suffer attributable to said drainage.

Wherefore, Pan American Petroleum Corporation prays that the defendant, Floyd A. Wallis, be duly cited to appear and answer this Petition, that he be served with a copy thereof and that, after due proceedings had, there be judgment herein in favor of petitioner, Pan American Petroleum Corporation, and against the defendant, Floyd A. Wallis, ordering the said defendant to specifically perform his obligations under the option agreement dated March 3, 1955, and further ordering the defendant to transfer by formal assignment to Pan American Petroleum Corporation all of his right, title and interest in and to the lease of December 18, 1958, effective as of January 1, 1959, issued by the Secretary of the Interior to defendant pursuant to Public Lands Application BLM 042017, reserving to defendant the overriding royalty interest described in said option agreement, all on condition that Pan American Petroleum Corporation discharge contemporaneously [fol. 203] therewith its obligation to pay the consideration for said assignment as in said agreement of March 3, 1955 provided according to the election of defendant.

Petitioner further prays for judgment herein against the defendant, in the event the defendant does not execute the formal assignment as directed by the Court, decreeing

Pan American Petroleum Corporation to be the owner of the aforedescribed lease of December 18, 1958 issued by the Secretary of the Interior to Wallis subject to the ownership of Wallis of the overriding royalty and consideration provided for in the option of March 3, 1955.

Petitioner further prays that the aforesaid judgment reserve unto petitioner all of petitioner's rights to recover damages resulting from drainage of the lands covered by the said lease of December 18, 1958.

Petitioner further prays for all full, general and equitable relief as the nature of the case may require and law and equity may permit, and for all costs.

William P. Hardeman, Percy Sandel, Cobb & Wright, By: Lloyd J. Cobb, Whitney Building, New Orleans, La., Attorneys for Defendant, Pan American Petroleum Corporation.

[fol. 203a]

EXHIBIT P-1 TO COMPLAINT

STATE OF LOUISIANA :
PARISH OF ORLEANS :

THIS AGREEMENT, made this 3 day of March, 1955, by and between FLOYD A. WALLIS, a resident of the Parish of Orleans, State of Louisiana, hereinafter referred to as "Wallis", and STANOLIND OIL AND GAS COMPANY, a Delaware corporation, hereinafter referred to as "Stanolind".

WITNESSETH, That

WHEREAS, Wallis has heretofore filed with the United States Department of the Interior, Bureau of Land Management, applications for five (5) non-competitive oil and gas leases on acquired lands, which applications have been assigned the following Bureau of Land Management numbers and cover the following described lands in Plaquemines Parish, Louisiana, to-wit:

B.L.M.A.-037435 [Metes and Bounds Description Omitted]

* * * * * * *

The above parcel of land is estimated to contain an area of 348.80 acres, more or less.

B.L.M.-A.-037436 [Metes and Bounds Description Omitted]

* * * * * * *

[fol. 203b] The above parcel of land is estimated to contain an area of 19.76 acres, more or less.

B.L.M.-A.-037437 [Metes and Bounds Description Omitted]

* * * * * * *

The above parcel of land is estimated to contain an area of 182.63 acres, more or less.

B.L.M.-A.-037438 [Metes and Bounds Description Omitted]

* * * * * * *

The above parcel of land is estimated to contain an area of 221.05 acres, more or less.

B.L.M.-A.-037439 [Metes and Bounds Description Omitted]

* * * * * * *

[fol. 203c] The above parcel of land is estimated to contain an area of 54.07 acres, more or less.

WHEREAS, Wallis, in consideration of Eight Thousand Three Hundred Dollars ($8,300.00) cash in hand paid, receipt of which is hereby acknowledged, has agreed to grant to Stanolind an option to acquire from Wallis any and all oil and gas leases which he will acquire in the event the said applications are approved and leases issued in response to such applications.

NOW, THEREFORE, in consideration of the premises, the parties hereto do hereby mutually agree by and between themselves as follows:

I.

Wallis does hereby grant to Stanolind the right and option, at Stanolind's election, to acquire any and all oil and gas leases which may be issued to Wallis, his heirs or assigns, under and by virtue of the above referred to applications.

II.

Wallis agrees to make diligent efforts to acquire leases on, to acquire the right to lease all lands described in the above referred to applications and to obtain the issuance of leases to him covering all of said lands.

III.

Wallis shall notify Stanolind in writing at its office in the Pan American Insurance Building, 2400 Canal Street, New Orleans, Louisiana, when leases have been issued to him under said applications and Stanolind shall, within fifteen (15) days after receipt of such notice, advise Wallis whether or not it elects to acquire such lease or leases from him. If Stanolind notifies Wallis that it does not desire to acquire leases from him or fails to notify Wallis of its election to exercise its option within said fifteen (15) day period, Stanolind's right to acquire leases hereunder shall lapse and there shall be no obligation on Wallis to transfer said leases.

IV.

If Stanolind elects to acquire said leases, Wallis agrees to transfer, within ten (10) days thereafter, to Stanolind all of his right, title and interest in and to said leases, [fol. 203d] reserving to himself an overriding royalty interest equal to one-eighth of eight-eighths (1/8 of 8/8) for a consideration which, at the election of Wallis, shall be either (a) Ninety Dollars ($90.00) per acre for each acre covered by the leases assigned, or (b) the reservation in Wallis of a production payment in the amount of Ninety

Dollars ($90.00) per acre for each acre covered by the leases assigned, payable out of one-thirty-second of eight-eighths (1/32 of 8/8), or (c) a combination of cash consideration and production payments out of one-thirty-second of eight-eighths (1/32 of 8/8) at the election of Wallis, which shall total Ninety Dollars ($90.00) per acre for each acre covered by the leases assigned.

V.

It is understood and agreed that there shall be deducted from the one-eighth of eight-eighths (1/8 of 8/8) overriding royalty reserved by Wallis all overriding royalties, production payments, net profits obligations, carried working interest and other payments out of or with respect to production with which the lease acreage is encumbered over and above the lessor's royalty on the date of the assignment to Stanolind. Wallis agrees that the leases shall not be burdened with such interests over and above the lessor's (United States) royalty in excess of the one-eighth of eight-eighths (1/8 of 8/8) to be reserved by him.

VI.

It is agreed that if assignments of leases are made to Stanolind under this agreement, such assignments shall provide that Stanolind shall have the right and power to pool or combine the acreage covered by the leases or any portion thereof with other land, lease or leases in the immediate vicinity thereof, in any manner provided by said leases, or by law, and in the event of such pooling, Wallis shall receive in lieu of the overriding royalties specified on production from the unit so pooled only such portion of such overriding royalties as the amount of his acreage placed in the unit or his overriding royalty interest thereon on an acreage basis bears to the total acreage so pooled in the particular unit involved.

VII.

The terms, covenants and conditions of the agreement shall be binding and shall inure to the benefit of the parties hereto, the successors and assigns of Stanolind, and the heirs, executors, administrators, personal representatives and assigns of Wallis.

[fol. 203e] THUS DONE AND SIGNED by the parties hereto in the presence of the undersigned competent witnesses on the day and date first above written.

/s/ Floyd A. Wallis
Floyd A. Wallis

STANOLIND OIL AND GAS COMPANY
By /s/ W. C. Imbt

WITNESSES:

/s/ John L. Lippa
/s/ Edwin A. Ellinghausen, Jr.
/s/ W. B. Boles
/s/ Joan Vehalage

State of Louisiana :
Parish of Orleans :

Before me, the undersigned Notary Public, on this day personally appeared John L. Lippa, who, being by me duly sworn, stated under oath that he was one of the subscribing witnesses to the foregoing instrument and that the same was signed by FLOYD A. WALLIS in his presence and in the presence of Edwin A. Ellinghausen, Jr., the other subscribing witness.

/s/ John L. Lippa

Sworn to and subscribed
before me this 4th
day of March, 1955.

/s/ Henry G. Neyrey, Jr.
Notary Public
[Seal]

STATE OF TEXAS :
COUNTY OF HARRIS :

On this 5 day of March, 1955, before me appeared W. C. Imbt, to me personally known, who, being by me duly sworn, did say that he is the Attorney-in-Fact for STANOLIND OIL AND GAS COMPANY, and that the foregoing instrument was signed in behalf of said corporation by authority of its Board of Directors, and said W. C. Imbt acknowledged said instrument to be the free act and deed of said corporation.

/s/ GERTRUDE OLIVER
Notary Public

GERTRUDE OLIVER
Notary Public in and for Harris County, Texas

[Seal]

[fol. 210]

IN UNITED STATES DISTRICT COURT

ANSWER OF FLOYD A. WALLIS—Filed January 27, 1960

Now comes Floyd A. Wallis, Defendant, and in response [fol. 211] to the complaint filed herein by Pan American Petroleum Corporation avers:

1.

The allegations of the complaint do not state a claim upon which any relief can be granted; and, therefore, this suit should be dismissed.

2.

Categorically answering the allegations of the complaint defendant avers:

(a) The allegations of Paragraphs I, II, III, IV, VIII and XXIV are admitted.

(b) The allegations of Paragraphs V, VI, VII, IX, X, XI, XII, XIII, XIV, XV, XVI, XVII, XVIII, XIX, XX, XXI, XXII, XXIII and XXV are denied, except as may be hereinafter otherwise specifically admitted.

3.

The option agreement of March 3, 1955 (P-1) is clear and unambiguous and speaks for itself and respondent denies any and all allegations of the complaint which would vary the terms thereof. Accordingly, defendant denies that the Public Domain Lands Application filed by him with the Bureau of Land Management on or about March 8, 1956, was within the contemplation of the option agreement or was filed by reason of the acquired lands applications referred to in the option agreement of March 3, 1955; and defendant denies that the purpose of the option agreement was to give plaintiff rights in any leases that might have [fol. 212] been issued under applications other than those specifically mentioned in the said option agreement.

(a) In the alternative, and only in the event that it is found that the provisions of said agreement are not clear and unambiguous, respondent would show that the parties by their actions have construed said agreement in such a way as to clearly show that Public Domain Lands Lease BLM 042017 was not within the contemplation of said agreement.

4.

Defendant would show that he was under no obligation to advise plaintiff of the filing of the Public Domain Lands Application; and if plaintiff received any information from defendant on the filing of such Application or otherwise, it was on a purely informal basis and defendant never formally notified plaintiff of such filing or of the progress of such Application or of the final results therefrom.

5.

Defendant has reason to believe and so avers that plaintiff kept itself currently informed of all of the applications that were filed by defendant, and, during the entire time that defendant was prosecuting his Public Domain Lands Application, plaintiff did absolutely nothing to assist defendant, never offered to assist defendant, and never advised defendant that it claimed any right or interest under defendant's Public Domain Lands Application; and defendant spent approximately five years and in excess of $50,000.00 in prosecuting the said applications (both Acquired and [fol. 213] Domain Lands Applications), all without any contribution (in services or funds) having been made or offered by plaintiff, except that prior to May 19, 1955, one R.K. Daley, a Civil Engineer employed by plaintiff, furnished several plats, or overlay maps, showing the lands described in defendant's Acquired Lands Application in relation to other applications that had been previously filed by one Morgan.

(a) The plaintiff is guilty of laches.

(b) The plaintiff knew that this defendant was spending substantial sums in prosecuting his Domain Lands Application and that defendant did not consider the aforementioned agreement of March 3, 1955, as covering the Domain Lands Application or the lease sought thereunder. If defendant had known that plaintiff claimed, or would claim, an interest in said Domain Lands Application and/or lease, defendant would not have spent such funds in prosecuting said application. The plaintiff, therefore, is estopped to contend that the agreement of March 3, 1955, included, or should be construed as including, the Public Domain Lands Lease No. BLM 042017.

6.

With respect to Paragraph XXV, defendant would show that the plaintiff had and has no right to the assignment of

defendant's Public Domain Lands Lease No. BLM 042017; but even if plaintiff has the right to the assignment of said lease (which is denied) the property covered thereby, although being drained, could not be protected by defendant because plaintiff deliberately and intentionally caused the [fol. 214] State of Louisiana to bring an action in the Parish of Plaquemines, Louisiana, not only to enjoin and restrain defendant from exercising his rights under the said lease, but also to remove from the records of the Parish of Plaquemines, Louisiana, the said lease and to have it declared a cloud upon the alleged title of the State of Louisiana. Furthermore, plaintiff filed a notice of lis pendens in this cause in the Parish of Plaquemines and caused Patrick A. McKenna, who filed Civil Action No. 8904 now pending before this Honorable Court, to file a notice of lis pendens in the Parish of Plaquemines; and plaintiff did everything within its power to prevent and actually prevented, defendant from drilling the leased property in order to protect it from being drained by adjacent wells. Therefore, whatever, if any, damages plaintiff has suffered, have resulted from plaintiff's own untoward actions.

7.

Defendant is informed and believes and so avers that while active steps were being taken by plaintiff to protect against drainage the lands covered by Public Domain Lands Lease BLM 042017, plaintiff was conspiring, and had conspired, with Shell Oil Company and the California Company, mineral lessees of the State of Louisiana, to prevent the drilling of said lands by defendant; and that plaintiff did everything within its power to prevent defendant from exercising his said lease, even to the extent of forcing the State of Louisiana to institute an action for the purpose of questioning the title of the United States of America to [fol. 215] the property which is subject to said lease.

8.

Plaintiff, therefore, comes into this court with unclean hands and is not entitled to the equitable remedy of specific performance; or any other equitable relief.

Alternative Plea

In the alternative, and only in the event that this Honorable Court should hold that plaintiff is entitled to have defendant assign to it the lease issued under Public Domain Lands Application No. BLM 042017 (which is denied), then and in such event, defendant is entitled to an order requiring that the plaintiff pay to defendant simultaneously with the execution of said assignment, the sum of $90.00 per acre for 826.87 acres, and that plaintiff be required at the same time to permit defendant to retain under the said lease an overriding royalty interest equal to one-eighth (1/8) of eight-eighths (8/8).

Wherefore, this defendant, Floyd A. Wallis, prays that plaintiff's suit be dismissed at its cost.

In the alternative, defendant prays that if the court should hold the plaintiff is entitled to an assignment of the lease issued under Public Domain Lands Lease Application BLM 042017 (which is denied), then the obligation of defendant to assign said lease should be conditioned upon the right of defendant to retain an overriding royalty interest equal to one-eighth (1/8) of eight-eighths (8/8), and the immediate payment by plaintiff to defendant of the sum of $74,418.30.

[fol. 216] C. Ellis Henican, Attorney for Respondent, 1112 Hibernia Building, New Orleans 12, Louisiana.

Murray F. Cleveland, Attorney for Respondent, 1112 Hibernia Building, New Orleans 12, Louisiana.

[fol. 217]

IN UNITED STATES DISTRICT COURT

AMENDED ANSWER OF FLOYD A. WALLIS—
Filed January 20, 1961

Comes Now, Floyd A. Wallis, defendant in the above numbered and styled Civil Action No. 8937, and subject to leave of Court amends his answer, as heretofore filed therein, in the following particulars, to-wit:

9.

This defendant desires to amend his original answer heretofore filed in Civil Action No. 8937, by adding thereto the following defenses, to-wit:

10.

The option agreement between Wallis and Pan-Am, dated March 3, 1955, terminated or expired, and/or the rights of Pan-Am thereunder prescribed or perempted, all on March 3, 1958, by virtue of the provisions of Section 27 of the Mineral Leasing Act of 1920, 41 Stat. 448, 30 U.S.C.A. 184, as amended subsequent thereto and including the amendment by Act of Congress of August 2, 1954, C. 650, 68 Stat. 648; U.S. Code Cong. and Adm. News, 83 Cong. 2nd Sess. (1954), Vol. 1, C. 650, Pub. 561, page 747, which statute Wallis herewith specially pleads in bar to said agreement or the assertion of any rights or cause of action pursuant thereto, as having been prescribed and/or perempted by virtue thereof.

11.

Any purported contract or agreement to sell, which resulted when Pan-Am exercised its option and notified Wallis that it elected to acquire the "public domain" lease No. [fol. 218] BLM-042017 is not a binding contract since it is entirely lacking in mutuality and, therefore, was not and is not binding on either party, inasmuch as it leaves it solely

within the power, or election, of one of the parties to (a) fix the price or consideration; or (b) to reserve a full production payment and thereby leave the agreement without there being either a price or any consideration to support a completed sale, which would thus be a nullity.

12.

Immediately upon the issuance by the United States unto this defendant of the lease, BLM-042017, defendant shows that one Henry S. Morgan, being the same Henry S. Morgan as referred to in Article VIII of the complaint herein, instituted in the United States District Court for the District of Columbia, Civil Action No. 3248-58 entitled "Henry S. Morgan v. Fred A. Seaton, Secretary of the Interior". The purpose of said suit generally, among other things, seeks to have declared null and void the issuance of the said lease, BLM-042017, and to direct the Secretary to cancel same and to reinstate certain applications filed by the said Morgan and to direct the Secretary to issue public lands leases to the said Morgan pursuant to said applications. This defendant shows that he forthwith intervened in said proceeding in order to assert and maintain the validity of the said lease BLM-042017.

Plaintiff herein has taken the position in this proceeding, that same being an equitable proceeding, that immediately upon the exercise by it of the option agreement and the filing of this suit, equity does and would consider this [fol. 219] plaintiff to be the owner of the said lease BLM-042017, and, after the filing of this Civil Action No. 8937, plaintiff filed a motion to intervene as defendant in the suit above referred to and which was filed by Henry S. Morgan, reciting that this defendant Wallis had thereafter referring to this suit Civil Action No. 8937, asserted that this plaintiff "is the beneficial owner of said lease designated BLM-042017 and all rights pertaining thereto", and that it "is a necessary real party in interest herein". It was further alleged in said motion by plaintiff that "the representation

of Pan American Petroleum Corporation by Wallis or the defendant Seaton may be inadequate . . . ". This defendant would show that as admitted by plaintiff in the foregoing motion, that if this plaintiff in fact had any claim or right to the said lease BLM-042017, which is denied, that nevertheless it recognized that this defendant's appearance and intervention in said action was representing such rights, if any, of this plaintiff, and this defendant would show that in doing so he has been required to engage counsel and incur considerable expense in connection therewith, all to the knowledge of this plaintiff, and that, while such was recognized by this plaintiff by its motion to intervene, yet shortly after the filing of the motion to intervene and on or about June 5th, 1959, this plaintiff did withdraw its motion to intervene in the Morgan suit, and has thereby left this defendant to assume the burden and expense of the defense of its alleged rights despite the fact that there was (and could) not be any such obligation on behalf of this defendant. In these proceedings, plaintiff, Pan American [fol. 220] Petroleum Corporation, is seeking the equitable relief of specific performance. At the same time and for the reasons herein stated, plaintiff, Pan American Petroleum Corporation, has failed to do equity and said plaintiff has unclean hands and may not, therefore, obtain and is estopped from claiming the relief herein sought.

13.

Under appropriate regulations issued by the Secretary of Interior, and in force and effect, at the time of the execution of the option agreement between Wallis and Pan-Am, dated March 3, 1955, as well as at the time when Wallis filed his application for the lease No. BLM-042017 and at the time of the issuance of said lease, and, presently in force and effect, it is provided:

(1) "§ 192.140. Assignments or transfers of leases or interests therein. Leases may be assigned or subleased as to all or part of the leases acreage and as to either

a divided or undivided interest therein to any person or persons qualified to hold a lease. Subject to final approval by the Bureau of Land Management, assignments, or subleases shall take effect as of the first day of the month following the date of filing in the proper land office of all the papers required by § 192.41 and § 192.42." 43 C.F.R. page 378, Revised, 1954.

(2) "§ 192.141. Requirements for filing or transfers.

• • • • • • •

[fol. 221]

(2) To obtain approval of a transfer affecting the record title of an oil and gas lease, a request for such approval must be made, within 90 days from the date of the execution of the assignment by the parties . . .

• • • • • • •

(f) Unless the lease account is in good standing as to the area covered by the assignment when the assignment and bond are filed, or is placed in good standing before the assignment is reached for action the lease will be cancelled as provided in § 192.161."

(3) "§ 192.83. Limitation of overriding royalties. Any agreement to create overriding royalties or payments out of the production of any lease which, when added to overriding royalties or payments out of production previously created and to the royalty payable to the United States, aggregate in excess of 17½ percent shall be deemed a violation of the terms of the lease unless such agreement expressly provides that the obligation to pay such excess overriding royalty or payments out of production shall be suspended when the average production per well per day averaged on the monthly basis is (a) as to

[fol. 222] oil, 15 barrels or less and (b) as to gas, 500,000 cubic feet or less. The limitations in this section will apply separately to any zone or portion of a lease segregated for computing Government royalty." 43 C.F.R., page 375.

In the event, and only in the event, that this Court should hold that the lease No. BLM-042017 is subject to the terms and provisions of said option agreement, of date March 3, 1955, and that by the terms thereof Pan-Am is entitled to an assignment thereof, pursuant to the provisions of said option agreement, any such assignment would entitle Wallis to reserve an overriding royalty of one-eighth of the total production from said property, which when combined with the one-eighth royalty reserved unto the United States, would exceed the maximum of 17½ per cent permitted by the above quoted §192.83, and, accordingly, the execution of such an assignment would conflict with said section, resulting in a breach of said lease, which would mean that the Bureau of Land Management would not approve such an assignment, thus rendering such assignment inoperative, and, in addition, the Bureau of Land Management would take steps to cancel the lease. In light of the foregoing a court of equity, in an equitable proceeding, should not enforce said option agreement, for the following additional reasons, to-wit:

(1) Ordering this defendant to execute such an assignment would be requiring this defendant to do a vain and useless thing.

[fol. 223] (2) The option agreement, because of the foregoing regulations, is impossible to perform.

(3) A court of equity will not order a party to do an act, which would in turn require that party to breach another contract, and, thereby violate the law.

(4) A court of equity will not issue a decree which it cannot enforce, and in light of the foregoing a court

could not require the Bureau of Land Management to approve such an assignment, and without such approval, the assignment would be inoperative.

(5) Under the equitable doctrine of balancing the equities and conveniences, as respects the parties, the enforcement of the option agreement which would result in breaching the lease, would not serve to benefit this plaintiff, whereas it would entail a very substantial loss to this defendant, all out of proportion to any possible gain to this plaintiff,

all of which, this defendant pleads in bar to the relief sought herein.

Wherefore, this defendant, Floyd A. Wallis, prays that this amended answer be allowed, and that there be judgment herein as prayed for in his original answer.

[fol. 224] Horace M. Holder, 1300 Beck Building, Shreveport, Louisiana;

C. Ellis Henican, 1112 Hibernia Building, New Orleans, Louisiana;

By: C. Ellis Henican,
Attorneys for Floyd A. Wallis.

[fol. 224a]

IN UNITED STATES DISTRICT COURT

(See opposite) ☞

Fifth Edition
(Sept. 1954)

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

(Form Approved.
Budget Bureau No. 42-R1.4.)

Office BLM

Serial No. 042017

OFFER TO LEASE AND LEASE FOR OIL AND GAS
(Sec. 17 Noncompetitive 5-Year Public Domain Lease)

Receipt No. _____

THIS OFFER MAY BE REJECTED AND RETURNED TO THE OFFEROR AND WILL AFFORD THE OFFEROR NO PRIORITY IF IT IS NOT PROPERLY FILLED IN AND EXECUTED OR IF IT IS NOT ACCOMPANIED BY THE REQUIRED DOCUMENTS OR PAYMENTS. SEE ITEM 9 OF GENERAL INSTRUCTIONS

(Fill in on a typewriter or print plainly in ink and sign in ink)

1. Mr. FLOYD A. WALLIS
(Name)
816 Carondelet Building
(Number and Street)
New Orleans 12, La.
(City and State)

PLEASE NOTIFY THE SIGNING OFFICER OF ANY CHANGE OF ADDRESS.

hereby offers to lease all or any of the lands described in item 2 that are available for lease, pursuant and subject to the terms and provisions of the act of February 25, 1920 (41 Stat. 437, 30 U. S. C. sec. 181), as amended, hereinafter referred to as the act, and to all reasonable regulations of the Secretary of the Interior now or hereafter in force, when not inconsistent with any express and specific provisions herein, which are made a part hereof.

2. Land requested	3. Land included in lease (Not to be filled in by Offeror)
Louisiana (State), Plaquemines Parish (County)	(State), (County)
T. ____ ; R. ____ ; Louisiana Meridian	T. ____ ; R. ____ ; Meridian
The land requested is unsurveyed and is described in Exhibit A and indicated on sheets 7, 8, 8A, 9, 9A and 10 of the map of the Passes of the Mississippi River, Southwest Pass, La., prepared by the Office of the District Engineer, New Orleans, La., Corps of Engineers, U.S.Army. The said Exhibit A and sheets of said map are attached hereto and made a part hereof.	This lease embraces the area and land described in Item 2. The rental retained is the rental amount shown in Item 4, plus an additional payment of $413.50.
Total Area 886.87 Acres	Total Area _____ Acres Rental retained $ _____

4. Amount remitted: Filing fee $10, Rental $ 413.50, Total $ 423.50

5. Undersigned certifies as follows:
(a) Offeror is a citizen of the United States. Native born Yes. Naturalized _____ Corporation or other legal entity (specify what kind): _____

(b) Offeror's interests direct and indirect in oil and gas leases and applications or offers therefor including this offer do not exceed 46,080 chargeable acres in the same State, or 100,000 chargeable acres in Alaska. (c) Offeror accepts as a part of this lease, to the extent applicable, the stipulations provided for in 43 CFR 191.6. (d) Offeror is 21 years of age or over (or if a corporation or other legal entity, is duly qualified as shown by statements made or referred to herein). (e) Offeror has described all surveyed lands by legal subdivisions and unsurveyed lands by metes and bounds, and further states that there are no settlers on unsurveyed lands described herein.

6. Offeror's signature to this offer shall also constitute offeror's signature to, and acceptance of, this lease and any amendment thereto that may cover any land described in this offer open to lease application at the time the offer was filed but omitted from this lease for any reason, or signature to, or acceptance of, any separate lease for such land. The offeror further agrees that (a) this offer cannot be withdrawn, either in whole or in part, unless the withdrawal is received by the land office before this lease, an amendment to this lease, or a separate lease, whichever covers the land described in the withdrawal, has been signed in behalf of the United States, and (b) this offer and lease shall apply only to lands not within a known geologic structure of a producing oil or gas field at the time the offer is filed.

7. If this lease form does not contain all of the terms and conditions of the lease form in effect at the date of filing, the offeror further agrees to be bound by the terms and conditions contained in that form.

8. It is hereby certified that the statements made herein are complete and correct to the best of offeror's knowledge and belief and are made in good faith.

IN WITNESS WHEREOF, Offeror has duly executed this instrument this 6th day of March 1956

WITNESSES

Barbara Trapolin 131 Audubon St. New Orleans — Floyd A. Wallis (Lessee signature)
(Name and address)

Beverly Prebeau 1131 Orleans St. New Orleans — _____ (Lessee signature)
(Name and address)

_____ (Attorney in fact)

This lease for the lands described in item 3 above is hereby issued, subject to the provisions of the offer and on the reverse side hereof.

THE UNITED STATES OF AMERICA

By Joseph F. Hagan DEC 19 1958
(Signing officer)

Chief, Minerals Adjudication Section
(Title) (Date)

Effective date of lease January 1, 1959.

18 U. S. C. sec. 1001 makes it a crime for any person knowingly and willfully to make to any Department or agency of the United States any false, fictitious or fraudulent statements or representations as to any matter within its jurisdiction.

This form may be reproduced provided that the copies are exact reproductions on one sheet of both sides of this official form, in accordance with the provisions of 43 C.F.R. 192.42 (a).

IN UNITED STATES DISTRICT COURT [fol. 224a]

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LEASE TERMS

SECTION 1. *Rights of lessee.*—The lessee is granted the exclusive right and privilege to drill for, mine, extract, remove, and dispose of all the oil and gas deposits, except helium gas, in the lands leased, together with the right to construct and maintain thereupon, all works, buildings, plants, waterways, roads, telegraph or telephone lines, pipelines, reservoirs, tanks, pumping stations, or other structures necessary to the full enjoyment thereof, for a period of 5 years, and so long thereafter as oil or gas is produced in paying quantities; subject to any unit agreement heretofore or hereafter approved by the Secretary of the Interior, the provisions of said agreement to govern the lands subject thereto where inconsistent with the terms of this lease. At the expiration of the initial 5-year term, an application may be made for extension of the lease in accordance with the regulation 43 CFR 192.120.

SEC. 2. The lessee agrees:

(a) *Bonds.*—(1) To file any bond required by this lease and the current regulations and until such bond is filed not to enter on the land under this lease. (2) To maintain any bond furnished by the lessee as a condition for the issuance of this lease. (3) To furnish a bond in a sum double the amount of $1 per acre annual rental, but not less than $1,000 nor more than $5,000, upon the inclusion of any part of the leased land within the known geologic structure of a producing oil or gas field. (4) To furnish prior to beginning of drilling operations and maintain at all times thereafter as required by the lessor a bond in the penal sum of $5,000 with approved corporate surety, or with deposit of United States bonds as surety therefor, conditioned upon compliance with the terms of this lease, unless a bond in that amount is already being maintained or unless such a bond furnished by an operator of the lease is accepted. (5) Until a general lease bond is filed to furnish and maintain a bond in the penal sum of not less than $1,000 in those cases in which a bond is required by law for the protection of the owners of surface rights. In lieu of any of the bonds described herein, the lessee may file such other bond as the regulations may permit.

(b) *Cooperative or unit plan.*—Within 30 days of demand, or, if the leased land is committed to an approved unit or cooperative plan and such plan is terminated prior to the expiration of this lease, within 30 days of demand made thereafter, to subscribe to and to operate under such reasonable cooperative or unit plan for the development and operation of the area, field, or pool, or part thereof, embracing the lands included herein as the Secretary of the Interior may then determine to be practicable and necessary or advisable, which plan shall adequately protect the rights of all parties in interest, including the United States.

(c) *Wells.*—(1) To drill and produce all wells necessary to protect the leased land from drainage by wells on lands not the property of the lessor, or lands of the United States leased at a lower royalty rate, or as to which the royalties and rentals are paid into different funds than are those of this lease; or in lieu of any part of such drilling and production, with the consent of the Director of the Geological Survey, to compensate the lessor in full each month for the estimated loss of royalty through drainage in the amount determined by said Director; (2) at the election of the lessee, to drill and produce other wells in conformity with any system of well spacing or production allotments affecting the field or area in which the leased lands are situated, which is authorized and sanctioned by applicable law or by the Secretary of the Interior; and (3) promptly after due notice in writing to drill and produce such other wells as the Secretary of the Interior may reasonably require in order that the leased premises may be properly and timely developed and produced in accordance with good operating practice.

(d) *Rentals and royalties.*—(1) To pay rentals and royalties in amount or value of production removed or sold from the leased lands as follows:

Rentals.—To pay the lessor in advance an annual rental at the following rates:

(a) If the lands are wholly outside the known geologic structure of a producing oil or gas field:

(i) For the first lease year, a rental of 50 cents per acre or fraction thereof, or if the lands are in Alaska, 25 cents per acre or fraction thereof.

(ii) For the second and third lease years, no rental.

(iii) For the fourth and fifth years, 25 cents per acre or fraction thereof.

(iv) For the sixth and each succeeding year, 50 cents per acre or fraction thereof, or if the lands are in Alaska, 25 cents per acre or fraction thereof.

(b) If the lands are wholly or partly within the known geologic structure of a producing oil or gas field:

(i) Beginning with the first lease year after 30 days' notice that all or part of the land is included in such a structure and for each year thereafter, prior to a discovery of oil or gas on the lands leased, $1 per acre or fraction thereof.

(ii) If this lease is committed to an approved cooperative or unit plan which includes a well capable of producing oil or gas and contains a general provision for allocation of production, the rental prescribed for the respective lease years in subparagraph (a) of this section, shall apply to the acreage not within a participating area, except that the rental for the second and the third lease years for such acreage shall be 25 cents per acre or fraction thereof.

Minimum royalty.—Commencing with the lease year beginning on or after a discovery on the leased land, to pay the lessor in lieu of rental, a minimum royalty of $1 per acre or fraction thereof at the expiration of each lease year, or the difference between the actual royalty paid during the year if less than $1 per acre, and the prescribed minimum royalty of $1 per acre, provided that if this lease is unitized, the minimum royalty shall be payable only on the participating acreage and rental shall be payable on the nonparticipating acreage as provided in subparagraph (b) (ii) above.

Royalty on production.—To pay the lessor 12½ percent royalty on the production removed or sold from the leased lands computed in accordance with the Oil and Gas Operating Regulations (30 CFR Pt. 221). Provided, however, that if this lease covers lands in Alaska and the lessee drills and makes the first discovery of oil or gas in commercial quantities in any geologic structure, the royalty on all production hereunder shall be 5 percent for 10 years following the date of such discovery, and thereafter the royalty rate shall be 12½ percent. If this lease is committed to an approved unit or cooperative plan (under which such a discovery is made), the 5-percent rate for 10 years following such discovery shall, for the purpose of computing royalty due the United States inure to the benefit of all the land to which an allocation is made under such plan.

(2) It is expressly agreed that the Secretary of the Interior may establish reasonable minimum values for purposes of computing royalty on any or all oil, gas, natural gasoline, and other products obtained from gas, due consideration being given to the highest price paid for a part or for a majority of production of like quality in the same field, to the price received by the lessee, to posted prices, and to other relevant matters and, whenever appropriate, after notice and opportunity to be heard.

(3) When paid in value, such royalties on production shall be due and payable monthly on the last day of the calendar month next following the calendar month in which produced. When paid in amount of production, such royalty products shall be delivered in merchantable condition on the premises where produced without cost to lessor, unless otherwise agreed to by the parties hereto, at such times and in such tanks provided by the lessee as reasonably may be required by the lessor, but in no case shall the lessee be required to hold such royalty oil or other products in storage beyond the last day of the calendar month next following the calendar month in which produced nor be responsible or held liable for the loss or destruction of royalty oil or other products in storage from causes over which he has no control.

(4) Rentals or minimum royalties may be waived, suspended or reduced and royalties on the entire leasehold or any portion thereof segregated for royalty purposes may be reduced if the Secretary of the Interior finds that, for the purpose of encouraging the greatest ultimate recovery of oil or gas and in the interest of conservation of natural resources, it is necessary, in his judgment, to do so in order to promote development, or because the lease cannot be successfully operated under the terms fixed herein.

(e) *Payments.*—Unless otherwise directed by the Secretary of the Interior, to make rental, royalty, or other payments to the lessor, to the order of the Bureau of Land Management at the places mentioned in the regulation 43 CFR 191.13. If there is no well on the leased lands capable of producing oil or gas in paying quantities, the failure to pay rental on or before the anniversary date shall automatically terminate the lease by operation of law. However, if the time for payment falls on a day in which the proper office to receive payment is closed, payment shall be deemed timely if made on the next official working day.

(f) *Contracts for disposal of products.*—To file with the Oil and Gas Supervisor of the Geological Survey not later than 30 days after the effective date thereof any contract, or evidence of other arrangement, for the sale or disposal of oil, gas, natural gasoline, and other products of the leased land: *Provided*, That nothing in any such contract or other arrangement shall be construed as modifying any of the provisions of this lease, including, but not limited to, provisions relating to gas waste, taking royalty in kind, and the method of computing royalties due as based on a minimum valuation and in accordance with the Oil and Gas Operating Regulations.

(g) *Statements, plats and reports.*—At such times and in such form as the lessor may prescribe, to furnish detailed statements showing the amounts and quality of all products removed and sold from the lease, the proceeds therefrom, and the amount used for production purposes or unavoidably lost; a plat showing development work and improvements on the leased lands; and a report with respect to stockholders, investments, depreciation and costs.

(h) *Well records.*—To keep a daily drilling record, a log, and complete information on all well surveys and tests in form acceptable to or prescribed by the lessor of all wells drilled on the leased lands, and an acceptable record of all subsurface investigations affecting said lands, and to furnish them, or copies thereof, to the lessor when required. All information obtained under this paragraph, upon the request of lessee, shall not be open to inspection by the public until the expiration of the lease.

(i) *Inspection.*—To keep open at all reasonable times for the inspection of any duly authorized officer of the Department, the leased premises and all wells, improvements, machinery, and fixtures thereon and all books, accounts, maps and records relative to operations and surveys or investigations on the leased lands or under the lease. All information obtained pursuant to any such inspection, upon the request of the lessee, shall not be open to inspection by the public until the expiration of the lease.

(j) *Diligence, prevention of waste, health and safety of workmen.*—To exercise reasonable diligence in drilling and producing the wells herein provided for unless consent to suspend operations temporarily is granted by the lessor; to carry on all operations in accordance with approved methods and practice as provided in the Oil and Gas Operating Regulations, having due regard for the prevention of waste of oil or gas or damage to deposits or formations containing oil, gas, or water or to coal measures or other mineral deposits, for conservation of gas energy, for the preservation and conservation of the property for future productive operations, and for the health and safety of workmen and employees; to plug properly and effectively all wells drilled in accordance with the provisions of this lease or of any prior lease or permit upon which the right to this lease was predicated before abandoning the same; to carry out at expense of the lessee all reasonable orders of the lessor relative to the matters in this paragraph, and that on failure of the lessee so to do the lessor shall have the right to enter on the property and to accomplish the purpose of such orders at the lessee's cost: *Provided*, That the lessee shall not be held responsible for delays or casualties occasioned by causes beyond lessee's control.

(k) *Taxes and wages, freedom of purchase.*—To pay when due, all taxes lawfully assessed and levied under the laws of the State or the United States upon improvements, oil and gas produced from the lands hereunder, or other rights, property, or assets of the lessee; to accord all workmen and employees complete freedom of purchase, and to pay all wages due workmen and employees at least twice each month in the lawful money of the United States.

(l) *Nondiscrimination.*—In connection with the performance of work under this contract, the contractor agrees not to discriminate against any employee or applicant for employment because of race, religion, color, or national origin. The aforesaid provision shall include, but not be limited to, the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post hereafter in conspicuous places, available for employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of the nondiscrimination clause.

The contractor further agrees to insert the foregoing provision in all subcontracts hereunder, except subcontracts for standard commercial supplies or raw materials.

(m) *Assignment of oil and gas lease or interest therein.*—As required by applicable law, to file for approval within 90 days from the date of final execution any instrument of transfer made of this lease, or any interest therein, including assignments of record title, working or royalty interests, operating agreements and subleases, such instrument to take effect upon the final approval by the Bureau of Land Management as of the first day of the lease month following the date of filing in the proper land office.

(n) *Pipelines to purchase or convey at reasonable rates and without discrimination.*—If owner, or operator, or owner of a controlling interest in any pipeline or of any company operating the same which may be operated accessible to the oil or gas derived from lands under this lease, to accept and convey and, if a purchaser of such products, to purchase at reasonable rates and without discrimination the oil or gas of the Government or of any citizen or company not the owner of any pipeline, operating a lease or purchasing or selling oil, gas, natural gasoline, or other products under the provisions of the act, or under the provisions of the act of August 7, 1947 (61 Stat. 913, 30 U. S. C. sec. 351).

(o) *Lands patented with oil and gas deposits reserved to the United States.*—To comply with all statutory requirements and regulations thereunder, if the lands embraced herein have been or shall hereafter be disposed of under the laws reserving to the United States the deposits of oil and gas therein, subject to such conditions as are or may hereafter be provided by the laws reserving such oil or gas.

(p) *Reserved or segregated lands.*—If any of the land included in this lease is embraced in a reservation or segregated for any particular purpose, to conduct operations thereunder in conformity with such requirements as may be made by the Director, Bureau of Land Management, for the protection and use of the land for the purpose for which it was reserved or segregated, so far as may be consistent with the use of the land for the purpose of this lease, which latter shall be regarded as the dominant use unless otherwise provided herein or separately stipulated.

(q) *Protection of surface, natural resources and improvements.*—To take such reasonable steps as may be needed to prevent operations from unnecessarily: (1) Causing or contributing to soil erosion or damaging any forage and timber growth thereon, (2) polluting the waters of reservoirs, springs, streams or wells, (3) damaging crops, including forage, timber, or improvements of a surface owner, or (4) damaging range improvements whether owned by the United States or by its grazing permittees or lessees; and upon conclusion of operations, so far as can reasonably be done, to restore the surface to its former condition. The lessor may prescribe the steps to be taken and restoration to be made with respect to lands of the United States and improvements thereon.

(r) *Overriding royalties.*—Not to create overriding royalties in excess of five percent except as otherwise authorized by the regulations.

(s) *Deliver premises in case of forfeiture.*—To deliver up to the lessor in good order and condition the land leased including all improvements which are necessary for the preservation of producing wells.

SEC. 3. The lessor reserves:

(a) *Easements and rights-of-way.*—The right to permit for joint or several use easements or rights-of-way, including easements in tunnels upon, through, or in the lands leased, occupied, or used as may be necessary or appropriate to the working of the same or of other lands containing the deposits described in the act, and the treatment and shipment of products thereof by or under authority of the Government, its lessees or permittees, and for other public purposes.

(b) *Disposition of surface.*—The right to lease, sell, or otherwise dispose of the surface of the leased lands under existing law or laws hereafter enacted, insofar as said surface is not necessary for the use of the lessee in the extraction and removal of the oil and gas therein, or to dispose of any resource in such lands which will not unreasonably interfere with operations under this lease.

(c) *Monopoly and fair prices.*—Full power and authority to promulgate and enforce all orders necessary to insure the sale of the production of the leased lands to the United States and to the public at reasonable prices, to protect the interests of the United States, to prevent monopoly, and to safeguard the public welfare.

(d) *Helium.*—Pursuant to section 1 of the act, and section 1 of the act of March 3, 1927 (44 Stat. 1387), as amended, the ownership and the right to extract helium from all gas produced under this lease, subject to such rules and regulations as shall be prescribed by the Secretary of the Interior. In case the lessor elects to take the helium the lessee shall deliver all gas containing same, or portion thereof desired, to the lessor at any point on the leased premises in the manner required by the lessor, for the extraction of the helium in such plant or reduction works for that purpose as the lessor may provide, whereupon the residue shall be returned to the lessee with no substantial delay in the delivery of gas produced from the well to the purchaser thereof. The lessee shall not suffer a diminution of value of the gas from which the helium has been extracted, or loss otherwise, for which he is not reasonably compensated, save for the value of the helium extracted. The lessor further reserves the right to erect, maintain, and operate any and all reduction works and other equipment necessary for the extraction of helium on the premises leased.

(e) *Taking of royalties.*—All rights pursuant to section 36 of the act, to take royalties in amount or in value of production.

(f) *Casing.*—All rights pursuant to section 40 of the act to purchase casing, and lease or operate valuable water wells.

SEC. 4. *Drilling and producing restrictions.*—It is agreed that the rate of prospecting and developing and the quantity and rate of production from the lands covered by this lease shall be subject to control in the public interest by the Secretary of the Interior, and in the exercise of his judgment the Secretary may take into consideration, among other things, Federal laws, State laws, and regulations issued thereunder, or lawful agreements among operators regulating either drilling or production, or both. After unitization, the Secretary of the Interior, or any person, committee, or State or Federal officer or agency so authorized in the unit plan, may alter or modify from time to time, the rate of prospecting and development and the quantity and rate of production from the lands covered by this lease.

SEC. 5. *Surrender and termination of lease.*—The lessee may surrender this lease or any legal subdivision thereof by filing in the proper land office a written relinquishment, in triplicate, which shall be effective as of the date of filing subject to the continued obligation of the lessee and his surety to make payment of all accrued rentals and royalties and to place all wells on the land to be relinquished in condition for suspension or abandonment in accordance with the applicable lease terms and regulations.

SEC. 6. *Purchase of materials, etc., on termination of lease.*—Upon the expiration of this lease, or the earlier termination thereof pursuant to the last preceding section, the lessee shall have the privilege at any time within a period of 90 days thereafter of removing from the premises all machinery, equipment, tools, and materials other than improvements needed for producing wells. Any materials, tools, appliances, machinery, structures, and equipment subject to removal as above provided, which are allowed to remain on the leased lands shall become the property of the lessor on expiration of the 90-day period or such extension thereof as may be granted because of adverse climatic conditions throughout said period: *Provided*, That the lessee shall remove any or all of such property where so directed by the lessor.

SEC. 7. *Proceedings in case of default.*—If the lessee shall not comply with any of the provisions of the act or the regulations thereunder or of the lease or make default in the performance or observance of any of the terms hereof except payment of rental, and such default shall continue for a period of 30 days after service of written notice thereof by the lessor, this lease may be canceled by the Secretary of the Interior in accordance with section 31 of the act, except that if this lease covers lands known to contain valuable deposits of oil or gas, the lease may be canceled only by judicial proceedings in the manner provided in section 31 of the act; but this provision shall not be construed to prevent the exercise by the lessor of any legal or equitable remedy which the lessor might otherwise have. Upon cancellation of this lease, any casing, material, or equipment determined by the lessor to be necessary for use in plugging or preserving any well drilled on the leased land shall become the property of the lessor. A waiver of any particular cause of forfeiture shall not prevent the cancellation and forfeiture of this lease for any other cause of forfeiture, or for the same cause occurring at any other time.

SEC. 8. *Heirs and successors-in-interest.*—It is further agreed that each obligation hereunder shall extend to and be binding upon, and every benefit hereof shall inure to, the heirs, executors, administrators, successors, or assigns of the respective parties hereto.

SEC. 9. *Unlawful interest.*—It is also further agreed that no Member of, or Delegate to, Congress, or Resident Commissioner, after his election or appointment, or either before or after he has qualified and during his continuance in office, and that no officer, agent, or employee of the Department of the Interior, except as provided in 43 CFR 7.4 (a) (1), shall be admitted to any share or part in this lease or derive any benefit that may arise therefrom; and the provisions of Sec. 3741 of the Revised Statutes of the United States, as amended (41 U. S. C. sec. 22) and Secs. 431, 432 and 433, Title 18 U. S. Code, relating to contracts, enter into and form a part of this lease so far as the same may be applicable.

INSTRUCTIONS

A. GENERAL INSTRUCTIONS

1. This offer must be filled in on a typewriter or printed plainly in ink and must be signed in ink.

2. This form is to be used in offering to lease noncompetitively public domain lands or oil and gas deposits reserved to the United States in disposal of such lands for the purpose of drilling, mining, extracting, removing and disposing of oil and gas deposits, except helium. This form should not be used in offering to lease acquired lands or lands on a known geologic structure of a producing oil or gas field.

3. Offers to lease may be made by individuals 21 years of age or over who are citizens of the United States, and by corporations, partnerships or associations.

4. This offer must be prepared in quintuplicate and filed in the proper land office. The term "filing" means the actual receipt of the offer in the proper land office. If the land is in a State for which there is no land office, the offer must be filed with the Bureau of Land Management, Department of the Interior, Washington 25, D. C. See 43 CFR 192.42 (b). If less than five copies are filed, the offeror will have 30 days from the date of first filing to file the other required copies, failing in which the offer will be rejected and returned to the offeror and will afford no priority.

5. The offeror shall mark one of the copies first filed at the top with the word "original." If this is not done, the manager will so mark one copy. If there is any variation in the land descriptions among the five copies, the one marked "original" shall govern as to the lands covered by the lease.

6. If additional space is needed in furnishing any of the required information it should be prepared on additional sheets, initialed and attached and made part of this offer to lease, such additional sheets to be attached to each copy of the form submitted.

7. If any of the land described in item 2 of the offer is open to oil and gas lease filing when the offer is filed but is omitted from the lease for any reason and thereafter becomes available for leasing to the offeror the original lease will be amended to include the omitted land, unless before the issuance of the amendment on Form 4-1168, the land office receives the withdrawal of the offer as to such land or an election to receive a separate lease to be dated in accordance with 43 CFR 192.40 in which case such separate lease will be issued. If the lease is amended the rental, royalty and the lease term will be the same as though the [illegible] had been included in the original lease when it was issued.

8. [illegible] the assignment of the whole interest in all or any part of the [illegible] the whole interest in all or any part of the offer. [illegible] assignment of an undivided fractional interest in the whole [illegible] may assign an undivided fractional interest in the whole offer. Applications for approval of assignments of an offer must include a statement that the assignee agrees to be bound by the offer to the extent it is assigned and must be signed by the assignee. In other instances assignments of the offer will not be approved [illegible] a lease for the lands or deposits covered by said [illegible]

9. The offer will be rejected and returned to the offeror and will afford the applicant no priority if: (a) The land description is insufficient to identify the lands or the lands are not entirely within a 6-mile square. (b) The total acreage exceeds 2,560 acres, except where the rule of approximation applies or is less than 640 acres or the equivalent of a section and is not within the exceptions in 43 CFR 192.42 (d). This does not apply where the total acreage is in error by not more than 10 percent. (c) The full filing fee and the first year's rental do not accompany the offer, the rental payment to be for the total acreage if known, and if not known, for the total acreage computed on the basis of 40 acres for each smallest legal subdivision, except where the rental is in error by not more than 10 percent. (d) The offer is signed by an agent in behalf of the offeror and the offer is not accompanied by a statement over the offeror's own signature with respect to holdings and citizenship and by the statements and evidence required by 43 CFR 192.42 (e) (4). (e) The offer is signed by a guardian or trustee in behalf of a minor and is not accompanied by the evidence required by 43 CFR 192.42 (e) (5). (f) Less than five copies of the offer are filed and the copies lacking are not received in the land office before the expiration of 30 days from the date of receipt of the copies first filed, or (g) There is noncompliance with item 5 (a) and 5 (e) of the Special Instructions. The offeror will be given an opportunity to file a new offer within 30 days from service of the rejection, and the fee and rental payments on the old offer will be applied to the new offer if the new offer shows the serial and receipt numbers of the old offer. The advance rental will be returned unless within the 30-day period another offer is filed.

B. SPECIAL INSTRUCTIONS

Item 2.—Total area of land requested should be shown in acres in space provided at bottom of item 2. That area, except where the rule of approximation applies, must not exceed 2,560 acres or be less than 640 acres or the equivalent of a section except as provided in 43 CFR 192.42 (d). All of the land must be within a 6-mile square. The lands requested if surveyed should be described by legal subdivisions showing meridian, State, township, range, and section, and if unsurveyed, by metes and bounds connected by [illegible] with some corner of the public land survey. Where [illegible] the approximate legal subdivisions of unsurveyed lands should be [illegible].

Item 3.—This space is not to be filled in. When lease [illegible] space will contain the identification of the leased area and total acres.

Item 4.—The total amount remitted should include a $10 filing fee and the first year's rental of the land requested at the rate of 50 cents an acre or fraction of an acre. The $10 filing fee is retained as a service charge, even in those cases where the offer to lease is completely rejected. In order to protect the offeror's priorities with respect to the lands requested, it is [illegible] the rental payment submitted with the offer be sufficient to cover all the land requested at the rate of 50 cents an acre or fraction thereof. If the land requested includes lots or irregular quarter-quarter sections, the exact area of which is not known to the offeror, rental may be submitted for the purpose of the offer on the basis of each such lot or quarter-quarter section containing 40 acres. If the offer is withdrawn in whole or in part before a lease is issued or if the offer is rejected in whole or in part, the rental remitted for the parts withdrawn or rejected will be returned. Where at the time the lease is to be issued, the land applied for or any part of it is within a known geologic structure of a producing oil or gas field, the lessee will be billed for the additional rental of 50 cents an acre on all the leased land as the yearly rental on such lands is $1 per acre. In Alaska, the rental payment to accompany the offer should be at the rate of 25 cents per acre.

Item 5. (a).—Offeror will indicate whether a citizen by birth or naturalization. If production is obtained under this lease or allocated to it, the citizenship status of the lessee will be verified.

If offeror is an unincorporated association (including a partnership), the offer must be accompanied by a statement giving the same showing as to citizenship and holdings of its members as required of an individual.

If offeror is a corporation it must submit a statement containing the following information: the State in which it is incorporated, that it is authorized to hold oil and gas leases and that the officer executing the lease is authorized to act on behalf of the corporation in such matters; the percentage of the voting stock and of all of the stock owned by aliens or those having addresses outside the United States. Where such ownership is over 10 percent, additional information may be required by the Bureau before the lease is issued or when production is obtained. If any appreciable percentage of the stock is held by aliens of the excepted class the application will be denied. If 20 percent or more of the stock of any class is owned or controlled by or on behalf of any one stockholder a separate showing of his citizenship and holdings must be furnished.

Item 5 (b).—Acreage included in unit plans and certain section 18 and 19 leases is not chargeable.

Item 5 (c).—Whenever applicable the stipulations referred to will be made a part of this lease and will be furnished the lessee with the lease when issued. The forms covering them [illegible] are as follows: 4-[illegible] Stipulations for lands where the surface control is under the jurisdiction of the Department of Agriculture; 4-[illegible] Lands [illegible]; 4-467 (a) Lands within the flow limits of a reservoir site, and 4-467 (b) Lands within the drainage [illegible] of a [illegible] reservoir. Whenever other stipulations are necessary, lessee will be required to agree to them before the issuance of the lease.

Item 5 (e).—If there are settlers attach a sheet giving the name and post-office address of each and description of the lands [illegible] metes and bounds and approximate legal subdivision.

[illegible] numbered according to numbers on offer form.

[fol. 224c]

EXHIBIT A

The land requested is unsurveyed and is located in Plaquemines Parish, Louisiana. It consists of five tracts containing an estimated total of 826.87 acres, more or less. Each of the metes and bounds descriptions of the five tracts appearing below is connected with a corner of the public land surveys. That corner in each case is the southeast corner of fractional Section 3, Township 24 South, Range 30 East, Louisiana Meridian, Louisiana, as shown on the official plat of that fractional township approved May 18, 1842. In all other respects, including approximate legal subdivisions, each of the tracts is described in accordance with Sheets 7, 8, 8A, 9, 9A and 10 of the map of the *Passes of the Mississippi River, Southwest Pass, La.*, prepared by the Office of the District Engineer, New Orleans, La., Corps of Engineers, U. S. Army. Copies of the said sheets of the said map are attached hereto and are hereinafter referred to as the attached map. Each of the five tracts is indicated on the attached map by being colored green and is designated by the same letter assigned to it in the descriptions below.

The land requested is adjacent to land described in the deed from George Jurgens to the United States, dated July 8, 1903 and recorded on July 10, 1903 in Conveyance Office Book No. 37, Folio 527, in the office of the Clerk of Court and Recorder, Plaquemines Parish, Louisiana.

The land requested consists of all of that land belonging to the United States, including that acquired by accretion, alluvion, reliction or dereliction, described as follows:

TRACT A

Beginning at the southeast corner of fractional Section 3, Township 24 South, Range 30 East, Louisiana Meridian, Louisiana; thence south 12,760 feet and west 6,080 feet to the true point of beginning, to wit, the Northwest corner of the NE ¼ SE ¼ of Section 46, Township 24 South,

Range 30 East; thence in a northwesterly direction at a right angle to the thread of the stream, namely the Southwest Pass of the Mississippi River, a distance of 620 feet, more or less, to the low water mark of the left descending bank of Southwest Pass; thence in a southwesterly direction along the low water line of the left descending bank of Southwest Pass with the meanders of the stream a distance of 7,100 feet, more or less, to a point at the intersection of the low water line of the left descending bank of Southwest Pass and the north boundary line of the E ½ SE ¼ of Section 3, Township 25 South, Range 30 East; thence east along the said north boundary line a distance of 560 feet, more or less, to the northeast corner of the E ½ SE ¼ of Section 3, Township 25 South, Range 30 East; thence east along the north boundary line of the NW ¼ SW ¼ of Section 2, Township 25 South, Range 30 East, a distance of 1,320 feet to the northeast corner of the NW ¼ SW ¼ of Section 2, Township 25 South, Range 30 East; thence south along the east boundary line of the West ½ SW ¼ of Section 2, Township 25 South, Range

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[fol. 224d] 30 East, a distance of 1,380 feet, more or less, to a point where the above said line intersects the top bank line formed along East Jetty; thence in a northeasterly direction along the top bank line formed along and approximately paralleling East Jetty, with the meanders thereof, a distance of 1,830 feet, more or less, to a point where said top bank line intersects the west boundary line of the NW ¼ SE ¼ of Section 2, Township 25 South, Range 30 East, thence north along the said west boundary line a distance of 520 feet, more or less, to the northwest corner thereof; thence east along the north boundary line of the NW ¼ SE ¼ of Section 2, Township 25 South, Range 30 East, a distance of 770 feet, more or less, to the intersection of said line and the top of the west bank line of Bayou Burrwood; thence in a northeasterly direction along the top of the west bank line of Bayou Burrwood, with the meanders of the bayou, a distance of 1,465 feet, more or less, to a point at the intersection of said bank line and the west

boundary line of the E ½ of the NE ¼ of section 2, Township 25 South, Range 30 East; thence north along the west boundary line of the E ½ NE ¼ of Section 2, Township 25 South, Range 30 East, a distance of 1,230 feet, more or less, to the northwest corner of the E ½ NE ¼ of Section 2, Township 25 South, Range 30 East; thence due north 2,640 feet to the point of true beginning.

The land described as aforesaid is indicated and designated Tract A on the attached map. The said tract of land is estimated to contain an area of 349.36 acres, more or less.

TRACT B

Beginning at the southeast corner of fractional Section 3, Township 24 South, Range 30 East, Louisiana Meridian, Louisiana; thence south, 20,680 feet and west 11,360 feet to the true point of beginning, to wit, the southeast corner of the SW ¼ SE ¼ of Section 3, Township 25 South, Range 30 East; thence north along the west boundary line of the E ½ SE ¼ of Section 3 a distance of 1,360 feet, more or less, to the intersection of said line and the low water mark of the left descending bank of Southwest Pass of the Mississippi River; thence in a southwesterly direction 1,740 feet, more or less, along the low water line of the left descending bank of Southwest Pass, with the meanders thereof, to a point where said low water line intersects the south boundary line of the SW ¼ SE ¼ of said Section 3; thence east 860 feet, more or less, along the south boundary line of said Section 3 to the point of true beginning.

The land described as aforesaid is indicated and designated Tract B on the attached map. The said tract of land is estimated to contain an area of 19.76 acres, more or less.
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[fol. 224e]

TRACT C

Beginning at the southeast corner of fractional Section 3, Township 24 South, Range 30 East, Louisiana Meridian, Louisiana; thence south 20,680 feet and west 10,040 feet to the true point of beginning, to wit, the southwest corner

of the SW ¼ SW ¼ of Section 2, Township 25 South, Range 30 East; thence east along the south boundary line of SW ¼ SW ¼ of said Section 2 a distance of 300 feet, more or less, to the top bank line formed along East Jetty; thence in a southwesterly direction along said top bank line a distance of 6,940 feet, more or less, to a point where said top bank line intersects the south boundary line of the SW ¼ SW ¼ of Section 10, Township 25 South, Range 30 East; thence west along the south boundary line of said Section 10 a distance of 1,060 feet, more or less, to the southwest corner thereof; thence north along the western boundary of said Section 10 a distance of 620 feet, more or less, to a point at the intersection of said line and the low water mark of the left descending bank of the Southwest Pass of the Mississippi River; thence in a northeasterly direction along the low water line of the left descending bank of Southwest Pass, with the meanders thereof, a distance of 2,480 feet, more or less, to a point at the intersection of said low water line and the north boundary of the NE ¼ SW ¼ of Section 10, Township 25 South, Range 30 East; thence east along the north boundary line of the NE ¼ SW ¼ of said Section 10 a distance of 1,310 feet, more or less, to the northeast corner thereof; thence north along the west boundary line of the SW ¼ NE ¼ of Section 10, Township 25 South, Range 30 East, a distance of 1,320 feet to the northwest corner thereof; thence east along the south boundary line of the NW ¼ NE ¼ of Section 10 a distance of 1,320 feet to the southeast corner thereof; thence north along the east boundary line of the NW ¼ NE ¼ of Section 10 a distance of 1,320 feet to the northeast corner thereof; thence east along the north boundary line of the NE ¼ NE ¼ of Section 10, Township 25 South, Range 30 East, a distance of 1,320 feet to the point of true beginning.

The land described as aforesaid is indicated and designated Tract C on the attached map. The said tract of land is estimated to contain an area of 182.63 acres, more or less.

TRACT D

Beginning at the southeast corner of fractional Section 3, Township 24 South, Range 30 East, Louisiana Meridian, Louisiana; thence south 18,040 feet and west 14,000 feet to the true point of beginning, to wit, the southwest corner of the SE ¼ NW ¼ of Section 3, Township 25 South, Range 30 East; thence east along the south boundary line of the SE ¼ NW ¼ of said Section 3 a distance of 990 feet, more [fol. 224f] or less, to the intersection of said boundary line and the low water mark of the right descending bank line of Southwest Pass; thence in a southwesterly direction along the low water line of the right descending bank of Southwest Pass, with the meanders thereof, a distance of 7,850 feet, more or less, to the point where said low water line intersects the south boundary line of the NW ¼ SE ¼ of Section 9, Township 25 South, Range 30 East; thence west along the south boundary line of the NW ¼ SE ¼ of said Section 9 a distance of 190 feet, more or less, to the intersection of said line and the east shoreline of West Bay, Gulf of Mexico; thence northeasterly along the east shoreline of West Bay and the southeast top of bank line of that slough connecting Mud Bay, Gulf of Mexico, and West Bay, Gulf of Mexico, and which approximately parallels and lies just to the southeast of West Jetty, a distance of 7,540 feet, more or less, to the intersection of said top bank line and the south boundary line of the SW ¼ NW ¼ of Section 3, Township 25 South, Range 30 East; thence east along the south boundary line of the SW ¼ NW ¼ of said Section 3 a distance of 930 feet, more or less, to the point of true beginning.

The land described as aforesaid is indicated and designated Tract D on the attached map. The said tract of land is estimated to contain an area of 221.05 acres, more or less.

TRACT E

Beginning at the southeast corner of fractional Section 3, Township 24 South, Range 30 East, Louisiana Meridian,

Louisiana; thence south 18,040 feet and west 15,320 feet to the true point of beginning, to-wit: the southwest corner of the SW ¼ NW ¼ of Section 3, Township 25 South, Range 30 East; thence east along the south boundary of the SW ¼ NW ¼ of said Section 3 a distance of 290 feet, more or less, to the intersection of said line and the top of the northwest bank line of that slough connecting Mud Bay and West Bay, both of the Gulf of Mexico, said slough approximately paralleling and lying just southeast of West Jetty; thence in a southwesterly direction along the top of said bank line a distance of 3,430 feet, more or less, to a point in NW ¼ NE ¼ of Section 9, Township 25 South, Range 30 East, said point being at the intersection of the aforementioned bank line and the east shoreline of West Bay, Gulf of Mexico; thence in a northerly direction along the east shoreline of West Bay, a distance of 1,620 feet, more or less, to its intersection with the south boundary line of the NW ¼ SE ¼ of Section 4, Township 25 South, Range 30 East, thence east along the south boundary line of NW ¼ SE ¼ of said Section 4 a distance of 400 feet, more or less, to the southeast corner of the NW ¼ SE ¼ of Section 4; thence north along the east boundary line of the NW ¼ SE ¼ of Section 4 a distance of 830 feet, more [fol. 224g] or less, to the top of the south bank line of Mud Bay; thence in generally a northeasterly direction along the top of said bank line, with the meanders thereof, a distance of 1,240 feet, more or less, to a point on the south boundary line of the SE ¼ NE ¼ of Section 4; thence east along the south boundary line of the SE ¼ NE ¼ of Section 4 a distance of 360 feet, more or less, to the true point of beginning.

The land described as aforesaid is indicated and designated Tract E on the attached map. The said tract of land is estimated to contain an area of 54.07 acres, more or less.

[fol. 1847]

IN UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

OPINION OF THE COURT—December 26, 1961

MacCracken, Collins & Whitney, Philip R. Collins, Courtney Whitney, Jr., Edmond G. Miranne, Attorneys for Patrick A. McKenna.

Cobb & Wright, Lloyd J. Cobb, Joseph V. Ferguson, II, William P. Hardeman, Percy Sandel, Attorneys for Pan American Petroleum Corporation.

Henican, James & Cleveland, C. Ellis Henican, Horace M. Holder, Attorneys for Floyd A. Wallis.

WRIGHT, District Judge:

These cases involve rights in a mineral lease covering about 830 acres on the oil-rich banks of Southwest Pass, one of the mouths of the Mississippi River, around the community of Burrwood in southermost Louisiana. The common defendant, Wallis, holds his lease from the United [fol. 1848] States. He did not come by it without a fight.[1]

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[1] The history of his contest with Morgan, a prior applicant before the Department of the Interior, is a long one. There was an initial skirmish over the "acquired lands" filings, which Wallis lost. Then the terrain shifted to the "public domain" applications and Wallis succeeded in obtaining a preliminary ruling voiding Morgan's prior filing for technical defects. But Morgan did not acquiesce in defeat. An elaborate rehearing before the Director of the Bureau of Land Management delayed his final decision another year. Failing in that, Morgan appealed to the Secretary of the Interior. By this time Wallis had an additional opponent, Strom, a later applicant who claimed a superior description of the lands. From the Secretary's rejection of their claims, Morgan and Strom prosecuted an appeal to the United States District Court for the District of Columbia. Their motion for a preliminary injunction was denied and, on February 20, 1961, summary judgment was entered in

Nor is his title yet secure.[2] But even if his triumph be short-lived, Wallis wants to enjoy it alone. The claimants here would spoil that hope. They assert a right to share in his victory. McKenna is his alleged co-adventurer, who claims a one-third interest in the lease; Pan American Petroleum Corporation demands an assignment of the lease under an option contract. Wallis admits the agreements, but insists they relate to another venture which came to naught. The present lease, he maintains, is the fruit of a different venture in which the claimants have no part.

[fol. 1849] The chronology of this controversy begins in early 1954. Wallis uncovered the acreage in question, apparently land of the United States on which no application for a mineral lease had been filed. He promptly communicated his "find" to McKenna, who was handling other matters for him in Washington before the Department of the Interior. In the meantime, another applicant, Morgan, submitted a lease offer covering at least portions of the lands involved. But Wallis nevertheless prepared his applications, five in number, and they were filed on June 2. In their collaboration on this venture, Wallis and McKenna worked out an agreement,[3] which was finally reduced to

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favor of Wallis. *Morgan* v. *Udall*, D. D.C., Civil Action No. 3248-58, 2/20/61. The court is advised that an appeal from that decision is presently pending before the Court of Appeals for the District of Columbia.

[2] Besides the possibility of reversal on the pending appeal in the proceedings entitled *Morgan* v. *Udall*, supra, Wallis must ultimately face the claim of the State of Louisiana in separate proceedings before this court. *State of Louisiana* v. *Floyd A. Wallis*, et al., E.D. La., Civil Action No. 9046. In that suit, Louisiana asserts title to the land involved here and disputes the right of the United States to grant a lease covering that acreage.

[3] Agreement was actually reached in a telephone conversation on March 18, 1954. However, relating as it did to immovables, that oral understanding did not then bind the parties. See Note 13, infra. Even now, though admitted under oath, it probably has no force in view of the requirement of "actual delivery" in verbal contracts affecting immovables. La. C.C., Art. 2275. But, in any

writing in a letter from Wallis dated December 27, 1954, approved by McKenna on January 3, 1955. Specifically referring to the applications already filed, the letter agreement recognizes in McKenna a one-third interest in those applications and in any lease to be issued thereunder.[4] [fol. 1850] Three months later, after swift negotiations, Wallis, acting alone,[5] granted Pan American an option to acquire any lease issued to him pursuant to the still pending applications.

At this point, and for some months yet, everyone concerned[6] assumed the acreage in question was "acquired land" of the United States,[7] being apparently accretion to a tract purchased by the Department of the Army from a

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event, since the date is not crucial and the oral contract is admitted only to the extent incorporated in the December 27 letter, we may rely on the written document as evidencing the agreement between the parties.

[4] In view of the disposition here made, it is unnecessary to decide whether the agreement created a joint venture, or is more properly characterized as an agency coupled with an interest in view of the provision granting Wallis sole management of the undertaking. See Note 5, infra. In any case, as Wallis admits, the agreement was effective to transfer to McKenna an interest in the then pending applications and any lease issued thereunder.

[5] No question is raised as to Wallis' authority to contract alone with respect to such a lease in view of the stipulation in his agreement with McKenna that "all dealings in connection with these leases shall be at [Wallis'] sole discretion and direction." McKenna complains only of Wallis' alleged misrepresentations touching on the execution of the option contract and his failure to share the $8,300 option payment received from Pan American.

[6] While Pan American's attorney in the option transaction, Sandel, claims to have adverted to the possibility that the acreage in question might be classified as public domain land of the United States, the evidence is clear that he personally believed it was acquired land.

[7] "Acquired land," as the term implies, is land obtained by the United States through purchase or other transfer from a state or a private individual and normally dedicated to a specific use. Land owned by the United States by virtue of its sovereignty is called "public domain land."

[fol. 1851] Louisiana patentee.[8] Wallis had sought a lease under the Mineral Leasing Act for Acquired Lands, 30 U.S.C. §351 et seq., which applies only to such lands.[9] He had filed applications which would be ineffective if, as happened, the acreage were ultimately determined to be public land.[10] Neither McKenna nor Pan American demurred. On the contrary, both actively supported the acquired lands theory. It was only in late 1955 or early 1956[11] that Wallis began to doubt he had guessed right about the character

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[8] The acreage in question is contiguous to a tract patented to Jergens by the State of Louisiana in 1898 and 1903, and sold by him in the latter year to the United States. The assumption of the parties apparently was that the area covered by the applications, being river alluvion formed by accretion or dereliction after this transaction, inured to the United States, as the then owner of the banks, see, La. C.C., Arts. 509, 510, under the same title as it held the banks, i.e., as "acquired lands." Ultimately, the Director of the Bureau of Land Management, whose conclusions were affirmed by the Secretary of the Interior and also, apparently, by the District Court for the District of Columbia, determined that title to the Jergens tract never passed to the State of Louisiana, but that it was a "mud lump" which, together with all accretions thereto, including the present acreage, always was, and remains, public domain land of the United States.

[9] The original Mineral Leasing Act of 1920, 30 U.S.C. §181 et seq., with certain exceptions not here relevant, applied only to public domain lands. See *Justheim* v. *McKay*, D. D.C., 123 F.Supp. 560, aff'd, 97 U.S. App. D.C. 146, 229 F.2d 29. Enacted to remedy this deficiency, the 1947 Act in terms applies only to "acquired lands" not subject to lease under the 1920 statute. 30 U.S.C. §§351, 352. See *McKenna* v. *Seaton*, 104 U.S. App. D.C. 50, 259 F.2d 780, 781, n.1.

[10] The parties all agree on this point. *Seaton* v. *Texas Company*, 103 U.S. App. D.C. 163, 256 F.2d 718, must be restricted to its peculiar facts.

[11] A dispute rages between McKenna and Wallis as to whether the realization that the land might be characterized as public domain resulted from one or another of two conferences held at the Department of Interior, or originated with Edelstein, the new attorney retained by the parties. But it is unnecessary to resolve this conflict since the discovery, by mutual accord, occurred no sooner than November, 1955, nor later than February, 1956.

of the land.[12] Then, on the advice of new counsel, he submitted another application for the same tract under the "public domain lands" Mineral Leasing Act, 30 U.S.C. §181 et seq. No new written agreements were entered into, nor [fol. 1852] were the old instruments amended. The question presented is whether McKenna and Pan American nevertheless acquired rights in the lease ultimately issued to Wallis under this fresh public domain application.

The issue is very narrow under the Louisiana rule that all "contracts applying to and affecting" "oil, gas, and other mineral leases" must be reduced to writing, La.C.C., Arts. 2275, 2440, 2462, via La.R.S. 9:1105.[13] Having failed to ob-

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[12] At the very outset, Wallis had apparently considered the acreage involved public domain land. But he quickly abandoned that position and accepted the view that it was acquired land, without further question until the end of 1955.

[13] While the legislative declaration that rights in mineral leases are "real rights and incorporeal immovable[s]," L.R.S. 9:1105, has not always been given full effect, see, e.g., *Reagan* v. *Murphy*, 235 La. 529, 105 So.2d 210; *Tinsley* v. *Seismic Explorations, Inc.*, 239 La. 23, 117 So.2d 897; *Hodges* v. *Long-Bell Petroleum Company*, 240 La. 198, 121 So.2d 831 (on rehearing); *Harwood Oil & Mining Company* v. *Black*, 240 La. 641, 124 So.2d 764, the Louisiana Supreme Court has been consistent in reading §1105 as requiring that contracts affecting such rights comply with the statute of frauds. *Arkansas Louisiana Gas Co.* v. *R. O. Roy & Co.*, 196 La. 121, 198 So. 768; *Davidson* v. *Midstates Oil Corporation*, 211 La. 882, 31 So.2d 7; *Wier* v. *Glassell*, 216 La. 828, 44 So.2d 882; *Acadian Production Corp. of Louisiana* v. *Tennant*, 222 La. 653, 63 So.2d 343. The rule applies to McKenna's agreement, whether it is considered as creating a joint venture or an agency relationship. See *Stock* v. *DeSoto Properties*, 221 La. 384, 59 So.2d 428, 430-431; La.C.C., Art. 2992. So does it apply to Pan American's option contract. La.C.C., Art. 2462.

Since the requirement that such contracts be in writing may affect the very existence of a cause of action or, at least, significantly affect the result, the Rule of Decision Act, 28 U.S.C. §1652, as interpreted in *Guaranty Trust Co.* v. *York*, 326 U.S. 99, compels adherence to the local law, in disregard of the more liberal policy of F.R.Civ.P., Rule 43(a). *Macias* v. *Klein*, 3 Cir., 203 F.2d 205; cf. *Kossick* v. *United Fruit Co.*, 365 U.S. 731. See also, *Zacharie* v. *Franklin*, 37 U.S. (12 Peters) 151; *Grafton* v. *Cummings*, 99 U.S. (9 Otto) 100; *Moses* v. *Lawrence County Bank*, 149 U.S. 298.

tain new written agreements,[14] each of the plaintiffs is compelled to rely on a single instrument. McKenna's claim is [fol. 1853] imprisoned in the letter agreement of December 27, 1954—January 3, 1955; Pan American's claim is confined to the language of the March 3, 1955 option. Except as it throws light on their original intent, the conduct of the parties after those dates is irrelevant. Any new understandings reached in 1956, 1957, 1958 or 1959 are unenforceable in the absence of a writing. Nor does it matter whether Wallis obtained his lease by breaching his trust, as alleged. If the claimants acquired an interest in the lease, it is under the written instruments, not by virtue of any subsequent estoppel.[15] Accordingly, we turn to those instruments.

The letter which incorporates the agreement between Wallis and McKenna, after particularly listing and identifying certain numbered lease applications, being those

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[14] Despite repeated contacts with him during three and a half years preceding issuance of the lease, Pan American claims not to have known about the new application filed by Wallis, and, accordingly, says it had no occasion to ask for revision of its option contract. But such knowledge is, of course, irrelevant. Pan American is not here penalized for negligence. Either the original agreement applies to the lease issued, in which case no amendment was necessary; or it does not, in which case Wallis might properly have refused to revise the contract. McKenna, on the other hand, knowing of the new application, immediately sought from Wallis written confirmation of his interest in any lease that might issue thereunder. The very next day after it was filed he transmitted to Wallis for execution a power of attorney covering the public domain application which acknowledged his supposed interest. Wallis refused to sign the instrument and shortly "discharged" McKenna.

[15] See *Scurto* v. *LeBlanc*, 191 La. 136, 184 So. 567; *Pan American Production Co.* v. *Robichaux*, 200 La. 666, 8 So.2d 635; *Wier* v. *Glassell*, supra; *Blevins* v. *Manufacturers Record Publishing Co.*, 235 La. 708, 105 So.2d 392, 414 (on rehearing), and cases there cited. Of course, if Wallis did in fact breach his agreements, he may be answerable in damages or compelled to make restitution. La.C.C., Arts. 1926, 1928, 1930-1934. But neither dissolution of the contracts, nor damages, are prayed for here. This is a suit for specific performance only.

filed by Wallis under the Mineral Leasing Act for Acquired Lands, confirms in McKenna "a ⅓ undivided interest *in the above captioned oil and gas lease applications* * * * [and] such lease or leases as may be issued * * * *under these captioned applications* * * *" (emphasis added). Similarly the agreement with Pan American recites the [fol. 1854] same five pending applications and grants the company "the right and option * * * to acquire any and all oil and gas leases which may be issued * * * *under and by virtue of the above referred to applications.* (Emphasis added.) Much is made of a second paragraph of the option agreement where Wallis promises, in general terms, to "make diligent efforts" to obtain a lease over the lands covered by the applications. But that provision does not purport to enlarge the scope of the grant.[16] Thus, both instruments speak exclusively of an acquired lands lease. Was this an oversight?

With scant excuse,[17] the court permitted parol evidence [fol. 1855] to show the true intent of the contracting par-

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[16] Paragraph II of the option contract reads:

"Wallis agrees to make diligent efforts to acquire leases on, to acquire the right to lease all lands described in the above referred to applications and to obtain the issuance of leases to him covering all of said lands."

Standing alone, this provision would convey nothing. It merely imposes an additional duty, supplementing the fundamental obligation recited in the first paragraph. Nor does it throw light on the subject matter of the contract. On the contrary, being a mere accessory stipulation, its apparently general terms must be considered qualified by paragraph I, which indicates precisely "the things concerning which * * * the parties intended to contract." La.C.C., Arts. 1959, 1961. See *State ex rel. Ditch* v. *Morgan's Louisiana & T.R. & S.S. Co.*, 111 La. 120, 35 So. 482, *Dufrene* v. *Bernstein*, 195 La. 575, 197 So. 236. As to Sandel's claim with respect to paragraph II, see Note 18, infra.

[17] The general rule, of course, is that, while extrinsic evidence is inadmissible when the words of the agreement are unambiguous, La.C.C., Arts. 1945(3), 1963, 2276, in case of doubt the court should consider what the parties said, or wrote, or did, in pursuance of their agreement. La.C.C., Arts. 1949, 1950, 1956. Here, the contracts may be thought unambiguous, but, in view of the

ties on the date the agreements were executed. But, not surprisingly, the documents and testimony produced only confirmed the indication of the written instruments that on January 3 and March 3, 1955, no one contemplated issuance of a lease to Wallis except in pursuance of the then pending acquired lands applications. That was all they talked about. And, quite naturally, that is all they put into their agreements.[18] Doubtless, McKenna and Pan American were both anxious to have in *any lease* Wallis might obtain over these lands. At the time, however, they saw only one means of achieving that end. Had they anticipated the ultimate issuance of a public domain lease, perhaps they would have purchased an interest in that contingency too. But that is a futile speculation. Obviously they cannot be said to have intended to buy a share they did not even advert to. The conclusion must be that the written agreements faithfully

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liberal rule adopted by the Louisiana courts, see *Plaquemines Oil & Development Co.* v. *State*, 208 La. 425, 23 So. 2d 171, 174; *Gulf Refining Co.* v. *Garrett*, 209 La. 674, 25 So. 2d 329, 338-339 (on rehearing); *Rosenthal* v. *Gauthier*, 224 La. 341, 69 So. 2d 367, 369; *Simmons* v. *Hanson*, 228 La. 440, 82 So. 2d 757, 758-759, and, in the absence of a jury, it seemed "a reasonable, common sense exercise of judicial discretion * * * to give the benefit of the doubt to the proponent of the offered evidence, in order to avoid a remand and retrial and in the interest of determining truth through trial." *J. B. Elkins* v. *Laura Stell Townsend*, 5 Cir., —— F.2d —— (11/17/61). See also, F. R. Civ. P., Rule 43(c).

[18] Indeed, Wallis' letter to McKenna, which embodies their agreement, traces almost literally the language of McKenna's prior letter requesting written confirmation of his interest. Though Campbell, the Pan American agent who negotiated the option "deal" with Wallis, makes no such claim, Sandel, the attorney who drafted the contract, insists that paragraph II of the contract was inserted, inter alia, to cover the contingency that a public domain lease might be issued to Wallis, after the latter alerted him to that possibility by mentioning that Morgan had filed both types of application. But all the evidence, including Sandel's own correspondence, contradicts that assertion. Moreover, it is difficult to understand why the draftsman was not more explicit if apprized of the contingency and intending to provide for it. Under the circumstances, the allegations must be rejected. See La. C.C., Art. 1958.

record what was in the minds of the parties. Accordingly, there is no pretext for a strained construction or for reformation of the instruments. These instruments, taken [fol. 1856] alone or illumined by parol evidence, limit the claims of McKenna[19] and Pan American to the acquired lands applications.

It may be true, as plaintiffs suggest, that the lease ultimately granted, pursuant to the public domain application, is, from the lessee's point of view,[20] no different than one issued under an acquired lands offer. But that decides nothing. For so might a lease acquired by Wallis from the state or by assignment from Morgan, had the latter prevailed, be in all respects identical to the one in suit. Yet, clearly, neither McKenna nor Pan American could properly assert any interest in a lease obtained in that way. The important fact here is that the lease in dispute resulted from a new filing, based on a new theory, which was governed by a different statute and processed under different regulations.[21] The public domain application cannot be viewed [fol. 1857] as a mere amendment of, or substitute for, the

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[19] Insofar as McKenna performed services beyond the obligations of his contract which contributed to the eventual issuance of the public domain lease, he may be entitled to compensation on a quantum meruit basis, or under the theory of unjust enrichment. But that is no part of his prayer in the present proceeding.

[20] There are differences from the lessor's point of view. Compare, e.g., 30 U.S.C. §191 with 30 U.S.C. §355 with respect to the disposition of moneys received by the United States as lessor.

[21] As already noted, lease of public domain lands is governed by the Mineral Leasing Act of 1920, 30 U.S.C. §181 et seq., while lease of acquired lands is governed by the Mineral Leasing Act for Acquired Lands of 1947. The latter statute adopts the rules and regulations for public lands leasing "to the extent that they are applicable," 30 U.S.C. §359, but, as a matter of fact, the regulations promulgated by the Secretary of the Interior are very different. Compare, e.g., 43 C.F.R. §192.42-192.42a with 43 C.F.R. §200.5-200.8. The particularity with which the acquired lands applications are listed and described in the instruments in suit demonstrates that the parties themselves were aware of this difference and appreciated its importance.

old offers. It stands on its own feet, holding its own priority. And the new filing in no way cancelled or superseded the earlier applications. In effect, Wallis had two irons in the same fire, in only one of which McKenna and Pan American held an interest.

In short, in the administrative view, at least, the lease in question is wholly unconnected with the original acquired lands applications. Tempted as it might be to disregard technicalities, even a court of equity must recognize as a reality administrative rules and regulations which so vitally affect valuable rights.[22] Thus, here, the distinction made between acquired lands leases and public domain leases cannot be ignored, and the lease issued must be viewed as the fruit of a fresh undertaking, separate and apart from the venture in which the claimants had a part. It follows that, whatever remedies they may have in separate proceedings, if Wallis dealt unfairly with them,[23] neither McKenna nor Pan American acquired any interest in the lease in suit.[24]

Decree accordingly.

J. Skelly Wright, United States District Judge.

New Orleans, Louisiana, December 26, 1961.

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[22] As Judge Hart observed during the hearing of *Morgan* v. *Udall*, supra: "These things get plumb technical." But, just as he did, so must this court give due weight to the administrative regulations, no matter how technical they may appear.

[23] See Notes 15 and 19 supra.

[24] Disposition on the ground stated renders moot the other factual and legal issues raised. Accordingly, no finding is entered with respect to McKenna's alleged misrepresentation of his qualifications to practice before the Department of the Interior or his alleged failure to fulfill the obligations assumed under his contract with Wallis, and no conclusion is reached with respect to Pan American's apparent failure to exercise its option in writing. Nor is there any occasion to reconsider the preliminary rulings entered by order dated September 13, 1960, on Wallis' motion to dismiss.

[fol. 1895]

IN UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

JUDGMENT—January 18, 1962

These matters having come on before the court without a jury and the court having heard and considered all of the testimony and evidence submitted on behalf of the respective parties and being of the opinion that (1) the defendants, Floyd A. Wallis and Pan American Petroleum Corporation, in Civil Action 8904-B are entitled to have the relief sought by Patrick A. McKenna denied; and (2) the defendant, Floyd A. Wallis, in Civil Action 8937-B is entitled to have the relief sought by Pan American Petroleum Corporation denied; and for the written reasons filed herein on December 26, 1961:

It Is Adjudged and Declared:

(1) That Patrick A. McKenna does not have the right to be recognized as the owner of an undivided ⅓ interest in Federal Oil and Gas Lease BLM-042017 issued to Floyd A. Wallis by the Secretary of the Interior on December 18, 1958, effective as of January 1, 1959.

(2) That the agreement dated March 3, 1955, by and between Floyd A. Wallis and the Stanolind Oil & Gas Company (now Pan American Petroleum Corporation) and duly registered in the Parish of Plaquemines, Louisiana, on January 16, 1959, and now appearing in COB 212, Folio 359, of the Records of said Parish, does not cover or pertain to the Federal Oil and Gas Lease BLM-042017 issued to Floyd A. Wallis; and, therefore, the demand of Pan American Petroleum Corporation to require Floyd A. Wallis to specifically perform his alleged obligations under [fol. 1896] the said agreement dated March 3, 1955 (and

to transfer by formal assignment to Pan American Petroleum Corporation all of his right, title and interest in and to the aforedescribed lease, reserving to the said Floyd A. Wallis the overriding royalty interest described in said option agreement, all conditioned upon the discharge by Pan American Petroleum Corporation of its obligations to pay the consideration provided for in said option agreement) be, and it is hereby denied.

(3) That the said option agreement between Floyd A. Wallis and Pan American Petroleum Corporation dated March 3, 1955, is effective with respect to Federal Oil and Gas Lease Applications BLM-A 037435 through 037439 and any lease issued thereunder.

(4) Accordingly, except as provided in paragraph (3), all relief demanded by Patrick A. McKenna in Civil Action 8904-B and by Pan American Petroleum Corporation in Civil Action 8937-B is hereby denied.

(5) That (a) the Notice of Lis Pendens filed on behalf of Patrick A. McKenna, plaintiff in Civil Action 8904-B, in the records of the Parish of Plaquemines, Louisiana, on May 15, 1959, and now appearing in MOB 40, Folio 140, of said Parish; and (b) the Notice of Lis Pendens filed on behalf of Pan American Petroleum Corporation (formerly Stanolind Oil and Gas Company), plaintiff in Civil Action 8937-B, in the Records of the Parish of Plaquemines, Louisiana, on April 3, 1959, and now appearing in MOB 39, Folio 615, of said Parish be, and they are hereby, ordered erased and cancelled and the Clerk of Court and Ex Officio [fol. 1897] Recorder for the Parish of Plaquemines, Louisiana, is hereby authorized and directed to cancel the said inscriptions and to place a notation of this decree in the margin of the original entry of each said notice.

(6) Floyd A. Wallis and Pan American Petroleum Corporation, defendants in Civil Action 8904-B, and Floyd A. Wallis, defendant in Civil Action 8937-B, shall have the

right to recover all taxable costs from the plaintiff in each said action.

(7) In accordance with the views expressed in the written reasons of December 26, 1961, whatever, if any, rights Patrick A. McKenna and/or Pan American Petroleum Corporation might otherwise have against Floyd A. Wallis, including such rights as may exist for damages and/or restitution, are hereby reserved.

Dated at New Orleans, Louisiana, this 18th day of January, 1962.

J. Skelly Wright, United States District Judge.

N.B. Though not specifically prayed for, the relief granted in paragraph (3) is accorded under F.R.Civ.P., Rule 54(c). Since no acquired lands lease has yet issued, and Pan American has accordingly not been called upon to exercise its option with respect thereto, the reserved question whether timely exercise in writing is required under the circumstances does not now affect this portion of the judgment.

The same relief cannot be accorded McKenna since the issues relating to his alleged misrepresentation of his quali- [fol. 1898] fications to practice before the Department of the Interior and his alleged failure to fulfill the obligations assumed under his contract with Wallis were left open by the Court's opinion. See Opinion, note 24.

No declaration is made with respect to the rights of either plaintiff in Federal Oil and Gas Application BLM-042112 filed in the name of T. Miller Gordon or any lease issued thereunder because that issue was not tendered and may not have been fully litigated.

S/ J S W

[fol. 1977] Minute Entry of Argument and Submission—January 15, 1963 (omitted in printing).

[fol. 1978]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 19631

PATRICK A. McKENNA, Appellant,

versus

FLOYD A. WALLIS and PAN AMERICAN PETROLEUM CORPORATION, Appellees.

PAN AMERICAN PETROLEUM CORPORATION, Appellant,

versus

FLOYD A. WALLIS, Appellee.

Appeals from the United States District Court for the Eastern District of Louisiana.

OPINION—January 21, 1964

Before Rives and Wisdom, Circuit Judges, and Bootle, District Judge.

Rives, Circuit Judge: These actions, involving common questions of law and fact, were consolidated in the district [fol. 1979] court and decided pursuant to an opinion reported at 200 F.Supp. 468. They involve rights asserted separately by Patrick A. McKenna and Pan American Petroleum Corporation in an oil and gas lease from the United States to Floyd A. Wallis covering 826.87 acres of exceedingly rich "mud lumps" at the mouth of the Mississippi River in Plaquemines Parish, Louisiana.

The lease was issued to Wallis on December 19, 1958, effective January 1, 1959. The lease was of public domain

land, that is land in which title vested in the United States because of its sovereignty pursuant to the Mineral Leasing Act of 1920, now appearing as Title 30, U.S.C.A. §181, et seq., as distinguished from acquired land, that is land which was once privately owned and then acquired by the United States, the leasing of which is pursuant to the Mineral Leasing Act for Acquired Lands of August 7, 1947, now appearing as Title 30, U.S.C.A. §351, et seq.

The claims both of McKenna and of Pan American were based upon events occurring prior to the issuance of the lease to Wallis. McKenna claimed that Wallis and he were joint venturers in acquiring the lease, and that he was entitled to an undivided one-third interest in the lease. Pan American claimed that Wallis had entered into an agreement granting Pan American the option to acquire the lease thereafter issued to Wallis. The district court decided that neither McKenna nor Pan American acquired any interest in the lease upon what the court referred to as a very narrow issue, saying:

> "The issue is very narrow under the Louisiana rule that all 'contracts applying to and affecting' 'oil, [fol. 1980] gas, and other mineral leases' must be reduced to writing. LSA-C.C. Arts. 2275, 2440, 2462, via LSA-R.S. 9:1105. Having failed to obtain new written agreements, each of the plaintiffs is compelled to rely on a single istrument. McKenna's claim is imprisoned in the letter agreement of December 27, 1954-January 3, 1955; Pan American's claim is confined to the language of the March 3, 1955 option. Except as it throws light on their original intent, the conduct of the parties after those dates is irrelevant. Any new understandings reached in 1956, 1957, 1958 or 1959 are unenforceable in the absence of a writing. Nor does it matter whether Wallis obtained his lease by breaching his trust, as alleged. If the claimants acquired an interest in the lease, it is under the written instruments, not by virtue of any subsequent estoppel."

McKenna v. Wallis, E.D. La. 1961, 200 F.Supp. 468, 471, 472.

We think that the district court committed fundamental error in applying Louisiana statutes and law to determine rights in a lease on public domain land which were and are subject only to the sovereignty of the United States. The principle as to which law, state or federal, applies was stated long ago in *Wilcox v. McConnell,* 1839, 38 U.S. (13 Peters) 498, 516:

> "We hold the true principle to be this, that whenever the question in any court, state or federal, is, whether [fol. 1981] a title to land which had once been the property of the United States has passed, that question must be resolved by the laws of the United States; but that whenever, according to those laws, the title shall have passed, then that property, like all other property in the state, is subject to the state legislation; so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States."

Subsequent decisions have made it clear that "title" as used in that principle includes not only the legal title, but also the equitable title, indeed, the entire bundle of rights going to make up ownership. Whether the lease from the United States to Wallis was in part for the benefit of McKenna or of Pan American or of both are questions to be determined by federal law.

Irvine v. Marshall, et al., 1858, 61 U.S. (20 How.) 558, requires the application of federal law until both legal and equitable titles have passed from the United States. The United States was not a party to that litigation, but the Court recognized in clear and unmistakable terms that the United States owed a duty, to be performed both through its General Land Office and through its federal courts, to see that the equitable title as well as the legal title to public lands was vested in the proper person who proved his right under the federal law. The opinion em-

[fol. 1982] phasized the doctrine of resulting trusts which may have application to the facts of this case:

"With respect to resulting trusts, and the jurisdiction and duty of the courts of the United States to enforce them, the opinion of this court has been emphatically declared; and so declared in a case of peculiar force and appositeness, because it related to the acts of an agent in the entry and survey of lands, and is in its principal features essentially the same with the cause now under consideration. We allude to the case of Massie v. Watts, reported in the 6th vol. of Cranch, p. 143. This was a suit in equity in the Circuit Court of the United States for the district of Kentucky, to compel the conveyance of land from an agent to his principal, upon the ground that the agent had withdrawn an entry on lands made in the name of his principal, had caused an entry and survey to be made in his own name, and had thereby obtained a legal title to this land. In decreeing the relief sought by the complainant, this court, expounding the law by the Chief Justice (pp. 169, 170), said: 'If Massie (*i.e.*, the agent) really believed that the entry of O'Neal (his principal), as made, could not be surveyed, it was his duty to amend it, or to place it elsewhere. But if in this he was mistaken, it would be dangerous in the extreme—it would be a cover for fraud which could seldom be removed, if a locator al- [fol. 1983] leging difficulties respecting a location might withdraw it, and take the land for himself. But Massie, the agent of O'Neal, has entered the land for himself, and obtained a patent in his own name. According to *the clearest and best-established principles of equity,* the agent who so acts becomes a *trustee* for his principal. He cannot hold the land under an entry for himself, otherwise *than as a trustee for his principal.*' This exposition of the equity powers of the courts of the United States as applicable to resulting trusts—a power inseparable from the cognizance over

frauds, one great province of equity jurisprudence—is conclusive.

"With respect to the power of the Federal Government to assert, through the instrumentality of its appropriate organs, and administration of its constitutional rights and duties, and with regard to such an assertion as exemplified in the management and disposition of the public lands, and the titles thereto, the interpretation of this court has been settled too conclusively to admit of controversy." 61 U.S. at 565, 566.

The principles of law announced in repeated opinions of the Supreme Court seem to us clearly to lead to the conclusion that as to the original patent, lease or other grant from the United States, federal law controls in determining title in its broadest sense, including strictly legal title, trust rights and any and all equitable or bene- [fol. 1984] ficial interests. *Gibson v. Chouteau,* 1871, 80 U.S. (13 Wall.) 92, 101, 102; *Sparks v. Pierce,* 1885, 115 U.S. 408, 413; *Van Bracklin v. State of Tennessee,* 1886, 117 U.S. 151, 168; *Widdicombe v. Childers,* 1888, 124 U.S. 400, 405;[1] *Felix v. Patrick,* 1892, 145 U.S. 317, 328; *United States v. Colorado Anthracite Co.,* 1912, 225 U.S. 219, 223; *Buchser v. Buchser,* 1913, 231 U.S. 157, 161; *Ruddy v. Rossi,* 1918, 248 U.S. 104, 106, 107; see also other cases cited in 73 C.J.S. Public Lands, §209, and 42 Am.Jur., Public Lands, §37.

Indeed the same principle was recognized by the Supreme Court of Louisiana in the early case of *Kittridge v. Breaud,* La. 1843, 39 Am. Dec. 512, as follows:

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[1] In that case, Widdicombe had got his patent but was held to be a purchaser in bad faith, the Court saying: "The holder of a legal title in bad faith must always yield to a superior equity. As against the United States his title may be good, but not as against one who had acquired a prior right from the United States in force when his purchase was made under which his patent issued. The patent vested him with the legal title, but it did not determine the equitable relations between him and third persons." 124 U.S. at 405.

"And the principle is well recognized in our jurisprudence, as well as in that of the courts of the United States, that where an equitable right, which originated before the date of the patent, whether by the first entry or otherwise, is asserted, it may be examined into: *Brush v. Ware,* 15 Pet. 93; *Bouldin v. Massie,* 7 Wheat. 149."

The Mineral Leasing Act itself makes clear that, as a part of the public policy of the United States directed at opposing the monopoly of federally-owned mineral de- [fol. 1985] posits, the Bureau of Land Management must examine into the qualifications of the real lessee and of any assignee of a mineral lease or of a part interest. See sections 181 and 184 of 30 U.S.C.A. Those provisions leave no room for operation of any State law.

The same result must be reached if we follow through on the logical views expressed by the Director of the Bureau of Land Management of the United States Department of Interior in his decision sustaining Wallis' application to lease as public domain land the acreage here involved:

"What Law Then is to Control?

"It is said in *United States v. Louisiana, supra* [1949, 339 U.S. 669], and *United States v. California, supra* [1946, 332 U.S. 19], that the resources in and under subaqueous soil of the sea are an incident to the paramount rights and power of the United States over the marginal sea; therefore, that power must be *paramount to any other power* in disposing of those resources. Since it was held that the United States had the paramount power over and Louisiana did not have title to the marginal sea, then Louisiana must not have had a basis for legislative jurisdiction to dispose of the subaqueous soil or resources even though the United States may not have acted or entered the field. If Louisiana did not have the necessary contacts

to establish a sufficient basis for legislative jurisdiction, how could any State real property law apply? [fol. 1986] The legislation and judicial decrees of a State can only apply to persons and things over which the State has jurisdiction. *Gibson v. Chouteau,* 13 Wall. 92, 99 (U.S. 1871).

"There is a strong presumption that any statute is to be construed *prima facie* territorial in effect. *American Banana Co. v. United Fruit Co.,* 213 U.S. 347, 357 (1908). This lack of jurisdiction is based upon the proposition that a State does *not* have the power to deny the paramount authority of the United States over the marginal sea, *United States v. Louisiana, supra;* '(c)alifornia, like the thirteen original colonies, never acquired ownership in the marginal sea. * * *,' *Id.,* 704; this power, or rather lack of it, has no relation to the power of a State to use or regulate the marginal sea absent conflicting Federal policy, and the question is open so far as the power of a State to extend or establish its external territorial limits *vis à vis* persons other than the United States or those acting on its behalf are concerned. *Id.,* 705. Nothing is apposite in *Manchester v. Massachusetts,* 139 U.S. 240 (1891) (inland waters); *The Abby Dodge,* 223 U.S. 166 (1912); or *Skiriotes v. Florida,* 313 U.S. 69, 75 (1940) (both cases involve power of a State over her citizens), for there is quite obviously a great difference between the exercise of police power, within or without the terri- [fol. 1987] torial boundaries of a State and the proprietary rights in land within those same boundaries. *Utah Power & Light Co. v. United States,* 243 U.S. 389, 404 (1914). The Department has taken the position that the boundary of the State of Louisiana prior to the date of the Submerged Lands Act of May 22, 1953 (67 Stat. 29; 43 U.S.C., secs. 1301-1315) was at the low water mark of the Gulf of Mexico and at that point marked by the separation of the inland waters from the

open sea. *Solicitor's Opinion,* M-36239 (October 1, 1954). *United States v. Louisiana, supra,* implies this result. It is my opinion, based upon the above-cited authorities and analysis, that State real property law never applied to any of the subaqueous soil seaward of the inland waters within the former boundary of the State of Louisiana.

"Is State law controlling or applicable in grants and title questions involving public lands of the United States? It is a principle of law that a State cannot by legislative fiat decree a forfeiture of the public lands of the United States and proclaim title in herself. *United States v. Oregon,* 295 U.S. 1, 29 (1934). This is based upon the rule that Federal questions cannot be ultimately decided by State tribunals. *Brewer-Elliott Oil & Gas Co., et al. v. United States, et al.,* 260 U.S. 77, 87 (1922). Thus, the courts of the United States will construe the grants from the United States [fol. 1988] without reference to the rules of construction adopted by the States for their own grants. *Packer v. Bird,* 137 U.S. 661 (1891); *Shively v. Bowlby,* 152 U.S. 1, 44 (1893). *United States v. Utah,* 283 U.S. 64, 75 (1930), states that '(s)tate laws cannot affect titles vested in the United States.' For example, the question of navigability is a Federal question, *United States v. Utah, supra,* 75; consequently, when the United States is disposing of a portion of its public domain, State law can no more affect the original paramount title of the United States which involves construction of one of its grants than could a State court or legislature pronounce a stream navigable with binding effect which the courts of the United States found to be non-navigable. *United States v. Oregon, supra,* 29; *Oklahoma v. Texas,* 258 U.S. 574, 583, 591 (1922). While the 'public land' States possess certain jurisdictional police powers over public lands of the United States situated within the State's boundaries, *McKelvey v. United*

> *States,* 260 U.S. 253, 258 (1922), those States have no basis for jurisdiction to legislate or otherwise affect title paramount to the public lands of the United States, and State real property law could in nowise divest or delimit the rights and expectations of the United States in its public lands as known at common law which is the general law followed by the courts of the United States."

[fol. 1989] We would intimate no opinion as to who may ultimately be entitled to prevail in this litigation. In our opinion, the judgment should be vacated and the cause remanded for re-trial upon the evidence already taken and any additional relevant evidence, and for full and complete findings of fact and conclusions of law on all issues under the applicable principles of federal law.

Vacated and Remanded.

WISDOM, Circuit Judge, dissenting:

I respectfully dissent:

In this case there is much to be said for drawing on the "federal common law" to determine the rights of the parties. After all, the parties claim under a lease from the United States. And, in the matter of equitable remedies, the law of the forum here differs importantly from the law of the rest of the States: the civil law does not recognize resulting trusts or constructive trusts, not at least as these great tools of justice are effectively used in the common law to rectify the effects of bad faith.

But I can find no escape from the consequences of the fact that title to the lease in question passed from the United States to Wallis.

With due deference, it seems to me that *Irvine v. Marshall* does not compel an application of federal common law rather than the law of the forum. In that case no patent had yet issued to either the plaintiff or the defendant, and

[fol. 1990] it was held that a state or territorial law could not be invoked to force the issuance of a certificate of title to one or the other of two competing parties. The Supreme Court recognized, however, that an entirely different rule would apply *once legal title had in fact passed from the United States*:

> "We hold the true principle to be this: that whenever the question in any court, State or Federal, is whether a title to land which was once the property of the United States has passed, that question must be resolved by the laws of the United States; but that whenever, according to those laws, the title shall have passed, then the property, like all other property in the State, is subject to state legislation, so far as that legislation is consistent with the admission, that the title passed and vested according to the laws of the United States."

Here, the United States transferred all of its lease interest to Wallis. On December 19, 1958, the Department of the Interior issued a public domain lands lease to Wallis over a prior applicant, Morgan, whose bids did not contain a sufficient description of the land. After appeals to the district court and Court of Appeals for the District of Columbia, Morgan's contentions were rejected and Wallis's right to the government lease became final. *McKenna v. Seaton*, D.C. Ct. App. 1958, 259 F.2d 780, *cert. den'd* 358 U. S. 835, 79 S. Ct. 57, 3 L. Ed. 2d 71; *Morgan v. Udall*, D.C. Ct. App. 1962, 306 F.2d 801, *cert. den'd* 371 U. S. 941, [fol. 1991] 83 S. Ct. 320, 9 L. Ed. 2d 275.

The case before the Court concerns a mineral lease and not a patent, but *Pan American Corporation v. Pierson*, 10 Cir. 1960, 284 F.2d 649, *cert. den'd* 366 U. S. 936, makes it clear that there is no distinction between a patentee and a lessee of a mineral lease, as far as passage of title to the mineral is concerned:

> "We deem it unnecessary to delve into the legal complexities as to whether an oil and gas lease grants a profit a prendre or creates an estate in land. Under the first theory the lessee gains title to the oil and gas after its severance and under the second the lessee has an ownership of the hydrocarbons in place. Under each theory the government, by the issuance of the lease, has performed the last act required of it to vest in the lessee the right to explore for, produce, market and sell the oil and gas underlying the leased premises."

Some of the decisions relied upon by the majority may be distinguished on the facts from this case. Thus, *Widdicombe v. Childers,* 1888, 124 U. S. 400 and similar cases are distinguishable in that the claimant "had acquired a prior right from the United States in force when his purchase was made under which his patent issued". There is no question here, as there was in *United States v. Louisiana,* 1949, 339 U. S. 669 and *United States v. California,* 1946, 332 U. S. 19, of the paramount power of the United States over the marginal sea. The issue is not one involving [fol. 1992] the State's assertion of jurisdiction. There is no interference here with any overriding national interest. As in *Bank of America National Trust & Savings Association v. Parnell,* 1956, 352 U. S. 29, 77 S. Ct. 119, 1 L. Ed. 2d 93, this litigation between private parties does not intrude upon national policy or the rights of the United States. When leasing its lands to individuals, unless there are special circumstances, the government acts in a proprietary capacity in the same way as does the private land owner. *Campfield v. United States,* 1897, 167 U. S. 518, 524.

If the law of the forum controls, as I think it does, although "the jurisprudence of this State has fluctuated in construing a mineral lease as being in essence a real right or a personal right, it has been consistent to the effect that the transfer of an interest in a mineral lease cannot be made the subject of a verbal agreement and cannot be

proved by parol evidence." *Hayes v. Muller,* La. App. 1962, 146 So. 2d 176, 179; certified to Supreme Court and affirmed. Louisiana law, therefore, does not allow McKenna to prove his claim to a one-third interest in the title to the lease or allow Pan American to go beyond the terms of the option agreement. Whatever rights McKenna may have to an accounting for the profits resulting from a joint venture (see *Hayes v. Muller*), or otherwise, he cannot prove title to an interest in the lease itself by parol evidence. And whatever rights Pan American may have for damages for Wallis's breach of covenant "to make diligent efforts" to accomplish the purpose of the option, the parol evidence [fol. 1993] rule bars a court enforced conveyance of a lease not covered by the option.

I would affirm the judgment of the district court, without prejudice to the plaintiffs' rights, if any, to bring new and different actions, not based on McKenna's claim to a one-third interest in the title to the lease and not based on Pan American's claim to specific performance of the option.

[fol. 1994]

Extract From the Minutes of January 21, 1964

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1962

No. 19631

D. C. Docket No. 8904

PATRICK A. McKENNA, Appellant,

versus

FLOYD A. WALLIS and PAN AMERICAN PETROLEUM CORPORATION, Appellees.

PAN AMERICAN PETROLEUM CORPORATION, Appellant,

versus

FLOYD A. WALLIS, Appellee.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before Rives and Wisdom, Circuit Judges, and Bootle, District Judge.

JUDGMENT—January 21, 1964

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, vacated; and that said cause be, and it is hereby remanded to the said District Court for re-trial upon the evidence already taken and any additional relevant evidence, and for full and complete findings of fact and conclusions of law on all issues under the applicable principles of federal law, in accordance with the opinion of this Court;

It is further ordered and adjudged that the appellee, Floyd A. Wallis, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"Wisdom, Circuit Judge, dissenting"

Issued as Mandate:

[fol. 1995]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 19631

PATRICK A. McKENNA, Appellant,

versus

FLOYD A. WALLIS and PAN AMERICAN PETROLEUM CORPORATION, Appellees;

PAN AMERICAN PETROLEUM CORPORATION, Appellant,

versus

FLOYD A. WALLIS, Appellee.

Appeals from the United States District Court for the Eastern District of Louisiana.

PETITION OF FLOYD A. WALLIS FOR REHEARING—
Filed February 10, 1964

Floyd A. Wallis, appellee in each one of these consolidated cases, respectfully petitions this Honorable Court for a rehearing of the appeals in the above-entitled con-
[fol. 1996] solidated cases, and, in support of this petition, represents to the Court as follows:

1. The opinion and decree of this Honorable Court entered in these two above-styled and numbered consolidated cases, under date of January 21, 1964, are erroneous and contrary to the law, and, without limiting the generality hereof, the said opinion and decree are erro-

neous and contrary to the law for the following specific reasons, to-wit:

I.

The Court Was in Error in Relying Upon the Case of *Irvine v. Marshall,* 61 U. S. (20 How.) 558, and in Failing to Apply and Follow the Doctrine of the Later Case of *Hodgson v. Federal Oil & Development Co., etc.,* 274 U. S. 15.

(a) This error resulted in both cases, when this Court, in relying upon *Irvine v. Marshall, supra,* completely ignored and apparently even failed to consider the later decision in *Hodgson v. Federal Oil & Development Co., etc., supra,* where appellant sought to establish his alleged right to a one-eighth (⅛) interest in an oil and gas lease upon 160 acres of land in the State of Wyoming granted by the United States to appellee under the Mineral Leasing Act of February, 1920, the said claim being based, among other things, upon an alleged "relationship of trust and confidence" and where, in rejecting appellant's position, the United States Supreme Court said (in speaking of a well-recognized principle which forbids a cotenant from acquiring and asserting an adverse title against his companion because of the mutual trust and confidence sup- [fol. 1997] posed to exist) that "If the interests of the cotenant accrue at different times, under different instruments, and neither has superior means of information respecting the state of the title, then, either, unless he employs his co-tenancy to secure an advantage, may acquire and assert a superior outstanding title, especially where there is no joint possession." In disposing of appellant's claim under this well-established exception to the general rule, the Supreme Court cited several decisions including those of the courts of last resort of the states of Michigan, Illinois and Mississippi, and then commented:

> "We know of no opinion by the courts of Wyoming to the contrary."

thereby clearly indicating that the rule invoked by appellant, as well as the exception that was applied by the Court, was to be measured by state law, and the decisions of other states were considered by the Court merely because there were no decisions from the State of Wyoming.

II.

This Court Was in Error in Relying Upon the Case of *Irvine v. Marshall*, 61 U. S. (20 How.) 558, and in Failing to Hold that its Authority as a Precedent Was Negated, if Not Overruled, by the Later Case of *Marquez v. Frisbie*, 101 U. S. 473, 25 L. Ed. 800.

(a) This error resulted in both cases, when this Court, in relying upon *Irvine v. Marshall, supra,* failed to con- [fol. 1998] sider the decision in *Marquez v. Frisbie, supra,* where the Court said:

> "There are also objections besides this, fatal to the complaint and the relief asked under it.
>
> "One of them is that the principal relief sought, that without which any other would be imperfect, is, that *defendants may be declared to hold the land in trust for plaintiff,* and compelled to convey the same accordingly. This, undoubtedly, means the legal title to the land, for the plaintiff alleges himself to have been in actual possession when he brought the suit and that he had been so for a great many years before. But the bill does not show that defendants, or either of them, ever had the legal title. On the contrary, it is a necessary conclusion from the allegations of the bill *that the legal title is in the United States.* After referring to the decision of the Secretary of the Interior against his claim, the petition says that 'In pursuance of this decision, an order was issued authorizing the defendants and other purchasers of the Vallejo title to enter the lands claimed by them; and the said defendants have entered and will be enabled to receive a patent for the said quarter-section.' It plainly ap-

pears from this: first, that defendants had not the legal title; second, that it was in the United States; and third, that the matter was still in fieri, *and under the control of the land officers.*

"Nothing in the record of the case before us gives evidence that any further steps in that department have been taken in the case.

[fol. 1999] "We have repeatedly held *that the courts will not interfere* with the officers of the Government, while in the discharge of their duties in disposing of the public lands, either by injunction or mandamus. Litchfield v. Register, 9 Wall. 575, 19 L. ed. 681; Gaines v. Thompson, 7 Wall. 347, 19 L. ed. 62; Secretary v. McGarrahan, 9 Wall. 298, 19 L. ed. 579.

"And we think it would be quite as objectionable to permit a state court, while such a question was under the consideration and within the control of the Executive Departments, to take jurisdiction of the case *by reason of their control of the parties* concerned, and render decrees in advance of the action of the Government, which would render its patent a nullity when issued.

"After the United States had parted with its title and the individual had become vested with it, the equities on which he holds it may be enforced, but not before. Johnson v. Towsley, 13 Wall. 72, 20 L. ed. 485; Shepley v. Cowan, 91 U. S. 330, 23 L. ed. 424.

"We did not deny the right of the courts to deal with the possession of the land, prior to the issue of the patent, or *to enforce contracts between the parties concerning the land.* But it is impossible thus to transfer a title which is yet in the United States." 101 U. S. 473, 474 and 475.*

(b) This error resulted in both cases, when this Court failed to recognize that the decision in *Marquez* holds that

* Unless otherwise noted, the emphasis of certain portions of the quotations herein has been supplied by petitioner.

[fol. 2000] the Court's actions in Irvine, and what it said therein about the power of a court of equity, was wrong, since the matter was still within the jurisdiction of the Land Department, and neither state nor federal courts could properly render decisions purporting to affect the title which was still vested in the United States.

(c) This error resulted in both cases in this Court's not holding that contracts between private individuals do not and cannot affect land, the title to which is in the United States, and that, accordingly, such contracts only operate *in personam* and are necessarily governed by local law.

III.

The Court Was in Error in Holding that "The United States Owed a Duty to Be Performed Both Through Its General Land Office and Through Its Federal Courts, to See that the Equitable as Well as the Legal Title to Public Lands Was Vested in the Proper Person, Who Proved His Right under the Federal Law," and thus "Whether the Lease from the United States to Wallis Was in Part for the Benefit of McKenna or of Pan American, or of Both, Are Questions to Be Determined by Federal Law."

(a) This error resulted in both cases, when this Court failed to follow the decision of the Supreme Court in *Ducie v. Ford,* 138 U. S. 587 (a case which cannot be distinguished from the cases at bar), *which affirmed the judgment of the lower Court in applying the local statute of frauds,* to an [fol. 2001] asserted *parol* claim of ownership and trust, with reference to a mining claim patented by the United States, where the asserted *parol* claim *originated prior to the issuance of the patent,* and this the Supreme Court did, without intimation or suggestion that the local statute of frauds was not the controlling law applicable.

(b) This error resulted in both cases, when this Court failed to accept and follow the decision by the Circuit Court of Appeal in *Blackner, et al. v. McDermott,* 176 F. (2d) 498 (CCA 10th, 1949), which case cannot be distin-

guished from the *McKenna* case, and which is in keeping with the decision by the Supreme Court in *Ducie v. Ford, supra,* and, which decision is contrary to the decision by the Court herein. (*Cf.* pp. 5, *et seq.,* of "Reply to Wallis to Original Brief of McKenna.")

(c) This error resulted in both cases, when this Court failed to accept and follow the decision of the Circuit Court of Appeal in *Oldland v. Gray,* 179 F. (2d) 408 (CCA 10th, 1950), certiorari denied, 339 U. S. 948, which decision is in keeping with the decision by the Supreme Court in *Ducie v. Ford, supra.*

(d) This error resulted in both cases, when this Court failed to hold, as respects the disposition of federal lands, or rights thereto, that no duty is imposed upon federal courts *which is over and beyond or greater than* the duty imposed by Congress upon the General Land Office, in view of the holding by the Supreme Court in *Alabama v. Texas,* 347 U. S. 272, that:

> "The power of Congress to dispose of any kind of property belonging to the United States 'is vested in [fol. 2002] the Congress without limitation' . . . The power over the public land thus entrusted to Congress is without limitations, 'And it is not for the Courts to say how that trust shall be administered.' . . . "

(d) This error resulted in both cases, when this Court failed to hold that the duty imposed upon the courts and the General Land Office, as respects the disposition of land of the United States, or rights thereto, is set forth by the Supreme Court in *St. Louis Smelting & Ref. Co. v. Kemp,* 104 U. S. 636, 646, 647, to-wit:

> "The general doctrine declared may be stated in a different form, thus: a patent, in a court of law, is conclusive as to all matters properly determinable by the Land Department, when its action is within the scope of its authority; that is, when it has jurisdiction under

the law to convey the land. In that court the patent is unassailable for mere errors of judgment. Indeed, the doctrine as to the regularity and validity of its acts, where it has jurisdiction, goes so far that if in any circumstances under existing law a patent would be held valid, it will be presumed that such circumstances existed...

"According to the doctrine thus expressed and the cases cited in its support, and *there are none in conflict with it,* there can be no doubt that the court below erred in admitting the record of the proceedings upon which the patent was issued, in order to impeach its validity. The judgment of the department upon their [fol. 2003] sufficiency was not, as already stated, open to contestation. If in issuing a patent its officers took mistaken views of the law, or drew erroneous conclusions from the evidence, or acted upon imperfect views of their duty, or even from corrupt motives, a *court of law* can afford no remedy to a party alleging that he is thereby aggrieved. *He must resort to a court of equity for relief,* and even there his complaint cannot be heard *unless he connects himself with the original source of title,* so as to be able *to aver that his rights are injuriously affected by the existence of the patent;* and he must possess such equities as will control the legal title in the patentee's hands. Boggs v. Merced Mining Co., 14 Cal. 279, 363. It does not lie in the mouth of a *stranger to the title,* to complain of the act of the government with respect to it. If the government is dissatisfied it can, on its own account, authorize proceedings to vacate the patent or limit its operation."

and as set forth by the Supreme Court in *Steel v. St. Louis Smelting & Ref. Co.,* 106 U. S. 447 (1882), when it said:

"...So with a patent for land of the United States, which is the result of the judgment upon the rights of the patentee by that department of the government,

to which the alienation of the public lands is confided, *the remedy of the aggrieved party must be sought by him in a court of equity, if he possess such an equitable right to the premises as would give him the title if the* [fol. 2004] *patent were out of the way.* If he occupy with respect to the land *no such position as this,* he can only apply to the *officers of the government* to take measures in its name to vacate the patent or limit its operation. It cannot be vacated or limited in proceedings where it comes collaterally in question. It cannot be vacated or limited by the officers themselves; their power over the land is ended when the patent is issued and placed on the records of the department. This can be accomplished only by regular judicial proceedings, taken in the name of the government for that special purpose."

(e) This error resulted in both cases, when this Court held that there is some duty imposed upon the courts and the General Land Office as respects the disposition of lands of the United States, or rights thereto, which is over and beyond or greater than that delineated by the Supreme Court in *St. Louis Smelting & Ref. Co. v. Kemp, supra,* and *Steel v. St. Louis Smelting & Ref. Co., supra.*

(f) This error resulted in both cases, when this Court did not follow the holding in the *St. Louis* case, *supra,* and thus failed to hold that:

(1) Only Wallis dealt with the Land Department, and, therefore, only Wallis derives a right from the original source of title, *i. e.,* the United States.

(2) Neither McKenna nor Pan American can "connect himself with the original source of title," *i. e.,* the United [fol. 2005] States; but that McKenna and Pan American only connect themselves to Wallis.

(3) Since neither McKenna nor Pan American dealt with the United States neither did or could derive any title or claim, equitable or legal, from the United States.

(4) Neither McKenna nor Pan American asserts or claims that the Land Department (a) did not properly divest the United States of its title to the lease, and (b) did not properly invest Wallis with title to said lease.

(5) Both McKenna and Pan American affirm the correctness of the action of the Land Department in having issued the lease to Wallis.

(6) Neither McKenna nor Pan American asserts that "his rights are injuriously affected by the existence of the patent (lease)," but, on the contrary, both affirm the proper issuance of the lease to Wallis, and claim under him.

(7) Since neither McKenna nor Pan American dealt with the United States, *vis-a-vis* the United States they are "strangers to the title" issued by the United States.

(8) Neither McKenna nor Pan American asserts that the Land Department, in issuing the legal title to the lease, should have named either or both of them as grantees of or cograntees with, Wallis.

[fol. 2006] (g) This error resulted in the *Pan American* case, when the Court failed to hold that (1) since Pan American had no contact with the United States, and (2) since the contract with Pan American was only an option contract, which only gave it a right to acquire a lease from Wallis, *but only after the legal title to the lease had issued to Wallis from the United States,* it could not be said that the issuance of such legal title by the United States was for the benefit of Pan American, and thus governed by federal law.

(h) This error resulted in both cases, when this Court failed to hold that contracts relating generally to the acquisition of lands of the United States, or rights thereto, are governed by local law, when such contracts contemplate that the legal title would issue from the United States to Wallis, and to Wallis alone.

(i) This error resulted in both cases, when this Court failed to hold that in disposing of federal lands there can be no duty upon either the Land Department or the Courts, which is not fully and finally discharged, when the title is actually issued and there is no showing that, in transferring the legal title, the Land Department (1) acted improperly, (2) was imposed upon, or (3) failed to give effect to a *prior right or claim originating with the Land Department.*

(j) This error resulted in both cases, when this Court failed to hold that the United States, in disposing of its lands or rights thereto, has no interest in disputes between private individuals, when no question is raised as to the correctness of the action of the Land Department, [fol. 2007] but, on the contrary, the said private parties affirm the correctness of such action, and assert claims based thereon.

(k) This error resulted *in the McKenna case,* when this Court failed to hold that the United States was not concerned with any controversy between Wallis and McKenna, in light of McKenna's allegation in Article V of his complaint (Tr. p. 4) that "it was determined that a Public Lands Application should be filed *in Wallis's name* with the Bureau of Land Management," thus disclosing that McKenna approved, in all respects, the action of the B. L. M. in issuing the lease to Wallis, and, the United States not being concerned, such controversy is governed by local law.

IV.

The Court Was in Error in Its Interpretation and Application of the Decision in *Irvine v. Marshall, et al.,* 1858, 61 U. S. (20 How.) 558.

(a) This error resulted in both cases, when this Court did not hold that the local statute involved in *Irvine* was not a statute of frauds (1) since the case was up on a demurrer, which admitted the agreement alleged upon (2)

it in nowise related to the manner or mode of proving the contract, and (3) under the statute the agreement involved could have been proven by *parol* evidence.

(b) This error resulted as to both cases, when this Court did not hold that the local statute involved in *Irvine* was not a statute of frauds, for upon remand of the case and on [fol. 2008] trial the existence of the agreement, as a written agreement, was shown. *Cf. Irvine v. Marshall* and *Barton*, 7 Minn. 286 (1862).

(c) This error resulted as to both cases, when this Court did not hold that the local statute involved in *Irvine* was an attempt to vest title, and thus affect substantive rights, when the legal title to the property was in the United States, and, in disregarding this language by the Supreme Court of the United States, to-wit:

> "... That in every instance of a grant or purchase, or of an agreement for the purchase of lands for a valuable consideration, in which the price or consideration shall be paid by one person, and the conveyance or the contract for title shall be to another, no use or trust shall result in favor of the person by whom such payment shall be made, *but the title and possession shall vest exclusively in the person named as the alienee in such conveyance or agreement.* The position asserted by the court of Minnesota, *in interpreting their Statute, must be understood as broadly as it has just been stated, or it has no application to the case before us ...*" 61 U. S. (20 How.) 558, 561.

(d) This error resulted as to both cases, when this Court did not hold that *Irvine* is inapplicable to these cases but applies to that class of cases recognized by the Supreme Court in *Marquez v. Frisbie*, 101 U. S. 473, 25 L. Ed. 800, when the Court said:

> [fol. 2009] "We did not deny the right of the Courts to deal with the possession of the land, prior to the

issue of the patent, or to enforce contracts between the parties concerning the land. But it is impossible thus to transfer a title which is yet in the United States." 101 U. S. 473, 475.

(e) This error resulted as to both cases, when this Court did not hold that, inasmuch as title had not issued from the United States in *Irvine,* what the Court said therein about the title of *Irvine,* and resulting trusts, was mere *obiter,* if not improper and uncalled for, since the Land Department had not acted, and hence the Court should have contented itself with saying that the local statute, being substantive law, was not binding on the officials of the Land Office.

(f) This error resulted as to both cases, when this Court failed to hold that what the Court said in *Irvine,* on the basis of *Massie v. Watts,* 6 Cranch. 143, was not actually supported by *Massie v. Watts,* for that case did not (1) involve federal law, but state law, since the lands had been patented by the State of Virginia, (2) the sole question in *Massie* was the equity power of a federal court, *sitting in one state,* to decree *in personam* a transfer of property situated in another state, (3) the legal title to the land had already issued, and (4) there was involved a question of conflicting, but independent, grants from the sovereign.

[fol. 2010]

V.

This Court Was in Error in Citing and Relying on the Cases and Authorities Noted at Page 7 of the Majority Opinion, Inasmuch as Such Authorities Are Clearly Distinguishable and Have No Controlling Authority in these Cases.

VI.

The Court Erred in Holding that the Contracts between Wallis and Plaintiffs, Respectively, Were Governed by Principles of Federal Law, Rather than Local Law, and in Not Affirming the Decision of Trial Court.

(a) This error resulted in both cases, when this Court held that federal law would apply to contracts between private individuals, rather than local law, where such contracts related generally to the acquisition of lands of the United States, or rights thereto, in disregard of the decision by the Supreme Court, with reference to such contracts executed by the early settlers of what is now the State of Oregon, where it held local law to be applicable, in *Stark v. Starr,* 94 U. S. 477, 487 (1876), saying:

> ". . . *They did not deny, in any of their dealings, the proprietorship of the United States;* but they acted upon a confident expectation that their possessions and improvements would be respected by the government, and that ultimately they should acquire the title. This expectation was founded upon the uniform action [fol. 2011] of the government in its dealings with the public domain, occupied by settlers in advance of legislation for its sale. It was, therefore, understood by the people that, whenever the legal title was thus obtained, it should inure to the benefit of the grantees of the claimant who secured the patent of the United States. *This understanding constituted, in reality, the unwritten conventional law of the State, which affected all transactions in land until the passage of the Donation Act . . .*"

VII.

If It Be Assumed that the Contracts Here Involved Are Governed by Federal Law, this Court Was in Error in Refusing to Affirm the Judgment of the Trial Court in Applying the Local Statute of Frauds, Which Is a Statute Affecting Remedy.

(a) This error resulted in both cases, when this Court refused to accept and follow the decisions of *Hamilton Foundry & M. Co. v. International M. & F. Wkrs.,* 193 F. (2d) 209 (CCA 6th, 1951), and *Hamilton* v. *Glassell,* 57 Fed. (2d) 1032 (CCA 5th), which were cited and discussed

at pp. 6, *et seq.*, of "Reply of Wallis to Original Brief of McKenna."

VIII.

Assuming Federal Law Is Applicable, this Court Was in [fol. 2012] Error in Remanding the Cases for a Trial on the Issue of What Constituted the Contracts Between the Parties, as Contracts, Since the Trial Court Heard All Evidence, *Parol* and Written, and Decided this Issue; Until this Court Has Determined that Such Decision Is in Error on this Issue, in the Light of the Proper Applicable Federal Law, It Has Not Determined that There Is Reversible Error as to this Issue.

(a) This error resulted in both cases, when this Court failed to distinguish between "harmless" error and "reversible" error, and failed to hold (as to the issue of what constituted the contracts between the parties, as contracts, and with respect to which the trial Court received and heard all extrinsic evidence, oral and written) that the trial Court's decision thereon was not "reversible" error merely because of the *source* of the law applied in determining such issue, and such decision would constitute "reversible error" as to this issue *only* when this Court has decided and determined that the decision was in error in the light of the proper federal law. The conclusions of the trial judge on this important basic issue are covered in the following extract from his opinion:

> ". . . Having failed to obtain new written agreements, each of the plaintiffs is compelled to rely on a single instrument. McKenna's claim is imprisoned in the letter agreement of December 27, 1954-January 3, 1955; Pan American's claim is confined to the language [fol. 2013] of the March 3, 1955 option. Except as it throws light on their original intent, the conduct of the parties after those dates is irrelevant."

* * * * * * *

"The letter which incorporates the agreement between Wallis and McKenna, after particularly listing and identifying certain numbered lease applications, being those filed by Wallis under the Mineral Leasing Act for Acquired Lands, confirms in McKenna 'a ⅓ undivided interest IN THE ABOVE CAPTIONED OIL AND GAS LEASE APPLICATIONS . . . (and) such lease or leases as may be issued . . . UNDER THESE CAPTIONED APPLICATIONS . . .' (emphasis added). Similarly, the agreement with Pan-American recites the same five pending applications and grants the company 'the right and option . . . to acquire any and all oil and gas leases which may be issued . . . UNDER AND BY VIRTUE OF THE ABOVE REFERRED TO APPLICATIONS.' (Emphasis added). Much is made of a second paragraph of the option agreement where Wallis promises, in general terms, to 'make diligent efforts' to obtain a lease over the lands covered by the applications. But that provision does not purport to enlarge the scope of the grant. Thus, both instruments speak exclusively of an acquired lands lease. Was this an oversight?

"With scant excuse, the court permitted parol evidence to show the true intent of the contracting parties on the date of the agreements were executed. But, not surprisingly, the documents and testimony pro- [fol. 2014] duced only confirmed the indication of the written instruments that on January 3 and March 3, 1955, no one contemplated issuance of a lease to Wallis except in pursuance of the then pending acquired lands applications. That was all they talked about. And, quite naturally, that is all they put into their agreements. Doubtless, McKenna and Pan-American were both anxious to share in ANY LEASE Wallis might obtain over these lands. At the time, however, they saw only one means of achieving that end. Had they anticipated the ultimate issuance of a public do-

main lease, perhaps they would have purchased an interest in that contingency too. But that is a futile speculation. Obviously they cannot be said to have intended to buy a share in a future they did not even advert to. The conclusion must be that the written agreements faithfully record what was in the minds of the parties. Accordingly, there is no pretext for a strained construction or for reformation of the instruments. These instruments, taken alone or illumined by parol evidence, limit the claims of McKenna and Pan-American to the acquired lands applications." 200 F. Supp. 468, 471, *et seq.*

2. For the reasons aforesaid, those heretofore argued and submitted in briefs heretofore filed, and the elaboration of the above, as set forth in a supporting brief to be filed in connection with this petition, a rehearing of the appeals in the above numbered and entitled consolidated cases should be granted.

[fol. 2015] Wherefore, the premises considered, Floyd A. Wallis, appellee in each one of the above numbered and styled consolidated cases, prays that a rehearing be granted in each said case, and, upon such rehearing, the opinion and decree under date of January 21, 1964, be set aside and judgment be entered affirming the judgment of the trial Court in both cases.

Respectfully submitted,

C. Ellis Henican, Suite 2601—225 Baronne Street, New Orleans, La. 70112; H. M. Holder, 1300 Beck Building, Shreveport, Louisiana, Attorneys for Floyd A. Wallis.

CERTIFICATE

I, one of the counsel for Floyd A. Wallis, appellee, in each one of the above numbered and styled consolidated causes, do hereby certify that the above and foregoing petition for rehearing is presented in good faith and not for delay, and that copies of the said petition have been forwarded to all other counsel of record herein by U. S. mail in envelopes properly addressed, with postage prepaid, on this 7 day of February, 1964.

C. Ellis Henican.

[fol. 2209]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 19631

PATRICK A. McKENNA, Appellant,

versus

FLOYD A. WALLIS and PAN AMERICAN PETROLEUM CORPORATION, Appellees.

PAN AMERICAN PETROLEUM CORPORATION, Appellant,

versus

FLOYD A. WALLIS, Appellee.

Appeals from the United States District Court for the Eastern District of Louisiana.

OPINION ON PETITIONS FOR REHEARING—April 20, 1965

Before Rives and Wisdom, Circuit Judges, and Bottle, District Judge.

[fol. 2210] Rives, Circuit Judge: All parties have petitioned for rehearing and the Court has received additional briefs. In our original opinion, this Court held, Judge Wisdom dissenting, that federal law should be applied to determine rights asserted separately by Patrick A. McKenna and Pan American Petroleum Corporation in an oil and gas lease from the United States to Floyd A. Wallis covering public domain land. The district court had decided that under Louisiana law neither McKenna nor Pan American acquired any interest in the lease. We vacated the judgment and remanded the cause "for re-trial upon the evidence already taken and any additional relevant evidence, and for full and complete findings of fact and conclusions of law on all issues under the applicable principles of federal law." Pan American has petitioned for a rehearing limited to the interpretation of its claimed option agreement with Wallis, and it requests this Court to find as a fact that Wallis breached his fiduciary relationship. McKenna limits his petition for a rehearing to a request for additional findings of a joint venture between Wallis and McKenna, that Wallis breached his fiduciary obligations to McKenna and that Wallis failed to prove fraud on the part of McKenna. Wallis challenges our holding that federal law governs the claims of McKenna and Pan American and our reliance upon *Irvine v. Marshall,* 61 U.S. (20 How.) 558 (1858).

As stated in our original opinion, the United States, acting through the Secretary of the Interior, issued an oil and gas lease of public domain land to Floyd A. Wallis pursuant to the Mineral Leasing Act of 1920, 30 U.S.C.A. §181, et [fol. 2211] seq. We have concluded that our decision should be more closely tied to that Act.

It should be noted that the actions before the district court, and before this Court on appeal, do not seek to overturn the decision of the Secretary awarding the lease to Wallis. McKenna and Pan American were not applicants who competed with Wallis before the Secretary. Indeed, it is evident that McKenna and Pan American supported

Wallis's claim to the Secretary that he was the first qualified applicant for the acreage in question and entitled to a lease. If these actions were those of "competing claimants," the Secretary's decision would be subject to judicial review only if it were shown that he had acted arbitrarily or unreasonably or that his interpretation of what constitutes "public lands" was erroneous as a matter of law. *E.g., Morgan v. Udall,* D.C. Cir. 1962, 306 F.2d 799.

We again deal with which law applies, and particularly with the contention that the Rules of Decision Act, 28 U.S.C. §1652 (1958), requires that state law be applied to determine the claims of McKenna and Pan American to the oil and gas lease. It appears that the district court felt that the Rules of Decision Act compelled adherence to the local law. See 200 F.Supp. at 471-72, n. 13. And the Tenth Circuit has followed that view in a case involving a claim of "joint venture" highly similar to McKenna's claim here. *Blackner v. McDermott,* 10 Cir. 1949, 176 F.2d 498. That court held, *inter alia,* that

> ". . . jurisdiction of the court resting upon diversity of Citizenship, and the action not being one under federal [fol. 2212] law, the relationship of the parties each toward the other in respect of the leasehold estate must be determined by the law of Wyoming. Erie Railroad Co. v. Tompkins, 304 U.S. 64 . . . Ruhlin v. New York Life Insurance Co., 304 U.S. 202 . . . ."

176 F.2d at 500. Although the actions in the instant case were predicated upon diversity of citizenship, and although the action is not one under federal law in the sense that federal law did not create the right of action, it does not necessarily follow that the district court was required to apply state law. The Rules of Decision Act[1] says nothing

[1] The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. 28 U.S.C.A. §1652.

about the basis of jurisdiction. While it is true in the bulk of diversity cases the substantive issues are nonfederal and hence state substantive law is determinative, this is not always true.[2] The law applied should be keyed to the nature of the issue before the court; if nonfederal, state substantive law should be applied; if a federal matter is before the court, federal law should be applied.[3] *Francis v. Southern Pacific Co.*, 1948, 333 U.S. 445, involved an action for the wrongful death of a railroad employee who was killed while riding on a free pass. Jurisdiction was predicated upon diversity of citizenship and the right of action was created by state law. Federal statutes provided extensive regulation of the giving of free passes by railroad; [fol. 2213] however, these statutes were silent as to the tort duties of a railroad to the recipient of a free pass. The Supreme Court held that federal law was to be applied and that state's tort law did not control. The "*Erie* doctrine" does not annul the federal courts' responsibility to develop federal common law in aid of the uniform implementation and protection of federal interests.[4]

In summary, when jurisdiction of the federal courts is based on diversity of citizenship, all nonfederal matters will be decided by applying the law of the state in which the court is sitting while federal issues in such cases will be decided by reference to federal law. Where federal matters are involved, the specific language of valid federal statutes will control when applicable; where federal statutes do not clearly articulate the law to be applied, federal courts must fill the interstices; federal courts can do this by reference to federal or state law and the choice here depends on a number of different factors.[5] The first ques-

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[2] See 1A Moore, Federal Practice ¶ 0.305[3], at 3045 (2d ed. 1961).

[3] See 1A Moore, op cit., *supra*, ¶ 0.305[3], at 3053.

[4] 50 *Va. L. Rev.* 1236 (1964).

[5] 1A Moore, op cit., *supra* ¶ 0.328, at 3901.

tion presented in the instant case is whether or not "federal matters" are involved.[6]

Prior to 1920, lands of the United States containing deposits of coal, phosphate, sodium, oil, oil shale, and gas were open to location and acquisition of title. Congress, by its mining laws, provided that claims might be "located" on these lands on the performance of certain conditions. Congress also made provision for issuing pat-
[fol. 2214] ents for claims located under the mining laws. See *Wilbur v. United States, ex rel. Krushnic,* 1930, 280 U.S. 306, 314. When the location of a mining claim was perfected under the law, it had the effect of a grant by the United States of the right of present and exclusive possession. The claim was property in the fullest sense of that term and might be sold, transferred, mortgaged, and inherited without infringing any right or title of the United States. The right of the owner was taxable by the state and was "real property" subject to the lien of a judgment recovered against the owner in a state or territorial court. See *id.* at 316. However, the Mineral Leasing Act of 1920 effected a complete change of policy in respect of the disposition of lands containing deposits of coal, phosphate, sodium, potassium, oil, oil shale, or gas. Such lands were no longer to be open to location and acquisition of title, but only to lease. *Id.* at 314 (dictum). A mineral lease does not give the lessee anything approaching the full ownership of a fee patentee, nor does it convey an unencumbered estate in the minerals. *Boesche v. Udall,* 1962, 373 U.S. 472, 478 (dictum) (Secretary has authority to cancel lease granted in violation of Act and regulations promulgated thereunder). In the latter case, the Supreme Court stated that,

> "Unlike a land patent, which divests the Government of title, Congress under the Mineral Leasing

[6] As one student commentator has put it: "First, the federal court must determine whether a sufficient federal interest is present to preempt the authority of state law." 50 *Va. L. Rev.* 1236, 2141 (1964).

> Act has not only reserved to the United States the fee interest in the leased land, but has also subjected the lease to exacting restrictions and continuing supervision by the Secretary."

[fol. 2215] *Id.* at 477-78. Thus the Secretary is given power to prescribe rules and regulations governing in minute detail all facets of the working of the land leased. 30 U.S.C.A. §189. The Secretary may direct complete suspension of operations on such land, 30 U.S.C.A. §209, or require the lessee to operate under a cooperative or unit plan, 30 U.S.C.A. §226 (j). See *Boesche v. Udall,* 1962, 373 U.S. 472, 478. And as we noted in our original opinion, the public policy of the United States directed at opposing the monopoly of federally-owned mineral deposits requires that the Secretary examine into the qualifications of the real lessee and any assignee of a mineral lease or of a part interest. See 30 U.S.C.A. §§ 181, 184. This includes oil and gas leases "acquired directly from the Secretary under this Act or otherwise . . . (including options for such leases or interests therein)." 30 U.S.C.A. § 184(d)(1). Such "options" are limited as to acreage, 30 U.S.C.A. § 184(d)(1), and time, 30 U.S.C.A. § 184(d)(2). "No option . . . shall be enforcible if entered into for a period of more than three years . . . without the prior approval of the Secretary." 30 U.S.C.A. § 184(d)(2). By implication, "options" for less than three years may be freely entered into without prior approval. However, "No option . . . shall be enforcible until notice thereof has been filed with the Secretary . . . ." 30 U.S.C.A. § 184 (d)(2). Furthermore, assignments or subleases of all or part of the acreage included in an oil or gas lease must be approved by the Secretary. See *Boesche v. Udall,* 1962, 373 U.S. 472, 478; 30 U.S.C.A. § 187a. The Secretary is required to disapprove the "assignment" or "sublease" only for lack of qualification under the Act or for lack of sufficient bond. See 30 [fol. 2216] U.S.C.A. § 187a. Nowhere in the Mineral Leas-

ing Act of 1920 are the terms "assignment" and "option" defined.

The posture of the instant case is interstitial. The Secretary has granted a lease to Wallis. We deal with claims that are, in essence, an alleged "option" and an alleged "assignment," but which, ultimately, must be approved by or registered with the Secretary. We think, therefore, that there is a sufficient federal interest for the substantive independence of the federal court in determining the claims of McKenna and Pan American.

It might be said that the absence of a congressional definition of "option" and "assignment"—whether they may be oral or arise by operation of trust—implies that we should look to the law of the state. But we are impressed by the fact that the Mineral Leasing Act of 1920 represents a comprehensive scheme of federal regulation. Besides the public policy directed at opposing the monopoly of federally-owned mineral deposits, Congress has expressed recent concern over "a potentially dangerous slackening in exploration for development of domestic reserves of oil and gas so necessary for our security in war and peace." It removed "certain legislative obstacles to exploration for development of the mineral resources of the public lands and [to] spur greater activity for increasing our domestic reserves." S.Rep. No. 1549, 86th Cong., 2d Sess. (1960), reprinted in 1960 U.S. Code Cong. & Ad. News 3313, 3314-15. As Judge Wisdom noted in his dissent, the civil law does not recognize resulting trusts or constructive trusts and therefore the law of Louisiana differs importantly from the laws of the common-law states. While [fol. 2217] it might be said that the claim of McKenna for the assignment of part interest in the acreage covered by the lease and the claim of Pan American of the option agreement constitute transactions essentially of local concern and that the resulting litigation is "purely between private parties," we think that the interest of the United States is directly affected. Compare *Bank of America Nat'l Trust & Sav. Ass'n v. Parnell,* 1956, 352 U.S. 29, 33-

34. It is clear that the Mineral Leasing Act recognizes the devices of "assignments" and "options" as concomitants to the public policy against monopoly of federally-owned mineral deposits and, on the other hand, the public policy towards development of our mineral resources and increasing our domestic reserves. We do not think the use of these devices as a part of the scheme of carrying forth this public policy should be limited by interstitial restrictions imposed by the law of the State of Louisiana, which are not present in the other states. In a word, we think this is an area for uniformity.[7]

We hold to what we said in our original opinion in that "we would intimate no opinion as to who may ultimately be entitled to prevail in this litigation . . . [T]he judgment should be vacated and the cause remanded for re-trial upon the evidence already taken and any additional relevant evidence, and for full and complete findings of fact and conclusions of law on all issues under the applicable principles of federal law."

Rehearing Denied.

[fol. 2218] Wisdom, Circuit Judge, dissenting:

I respectfully dissent.

I do not say that the Court's decision is likely to start dangerous temblors in American federalism. It has always been in the cards that federal common law would expand as the activities of the national government expanded.[1] For many years, before *Erie,* the federal "judge followed his own nose"; he "sat down and looked up what relevant federal law there might be in the cases and otherwise decided what the law ought to be . . . though in some

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[7] Hodgson v. Federal Oil & Development Co., 1927, 274 U.S. 15, does not lead to a different result. We read *Hodgson* as fashioning a federal law of fiduciary relationship by drawing on the law of several states. See *id.* at 19-20.

[1] See Mishkin, The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision, 105 U. Pa. L. Rev. 797 (1957).

few instances the judge might consider relevant state decisions".[2] Moreover, I agree with Judge Henry Friendly's summary of the development, since *Erie*, of the "new" federal common law: "We may not have achieved the best of all possible worlds with respect to the relationship between state and federal law. But the combination of *Erie* with *Clearfield* and *Lincoln Mills* has brought us to a far, far better one than we have ever known before."[3] I do say that in this case the Court's resort to federal common law is so inappropriate as to amount to a deep and uncalled-for cut against the grain of American federalism.

I.

We sit as an Erie court, bound by the law of Louisiana; bound too by the Rules of Decision Act. Yet in this squabble between private persons the Court holds that the nature of the ownership of the lease, that is, the nature [fol. 2219] of the lessee's interest in the minerals as against third party claimants, is a matter to be determined by judge-made federal common law. The Court brushes aside the state's longstanding public policies against title by parol[4] and against resulting and constructive trusts, de-

[2] Morgan, The Future of a Federal Common Law, 17 Ala. L. Rev. 10, 12 (1964).

[3] Friendly, In Praise of *Erie*—And of the New Federal Common Law, 39 N.Y.U. L. Rev. 383, 422 (1964).

[4] In the opinion below Judge Wright correctly noted: "While the legislative declaration that rights in mineral leases are 'real rights and incorporeal immovable[s],' LSA-R.S. 9:1105, has not always been given full effect. [citing cases] . . . [T]he Louisiana Supreme Court has been consistent in reading § 1105 as requiring that contracts affecting such rights comply with the statute of frauds. Arkansas Louisiana Gas Co. v. R. O. Roy & Co., 196 La. 121, 198 So. 768; Davidson v. Midstates Oil Corporation, 211 La. 882, 31 So. 2d 7; Wier v. Glassell, 216 La. 828, 44 So. 2d 882; Acadian Production Corp. of Louisiana v. Tennant, 222 La. 653, 63 So. 2d 343. . . . The rule applies to McKenna's agreement, whether it is considered as creating a joint venture or an agency relationship. See Stack v. De Soto Properties, 221 La. 384, 59 So.

vices alien to the civil law.[5] The "jurisprudence of this [fol. 2220] State . . . has been consistent to the effect that the transfer of an interest in a mineral lease cannot be

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2d 428, 430-431; LSA-C.C. Art. 2992. So does it apply to Pan American's option contract. LSA-C.C. Art. 2462." McKenna v. Wallis, E.D.La. 1961, 200 F. Supp. 468, n. 13 at 471. In Hayes v. Muller, La. App. 1962, 146 So. 2d 176, 179, the court held that an alleged joint venture effecting the transfer of an interest in a mineral lease cannot be made the subject of a verbal agreement and cannot be proved by parol evidence. The Louisiana Supreme Court affirmed, 245 La. 356, 158 So. 2d 191, 198, commenting, on rehearing, that it had been "zealous . . . to guard against any deviation from the rule" that the "plaintiff cannot show an oral agreement to purchase property for him, and enforce the contract when it has been fraudulently violated (by acquisition in defendant's name), despite the argument made therein that the evidence did not constitute an attack on the title of the defendant but was merely an attempt to profit from and through such title."

[5] "Article 21 of the Louisiana Civil Code of 1870 authorizes the courts to apply equitable principles in their decisions. Porter v. Conway, 181 La. 487, 159 So. 725 (1934); see Willey v. St. Charles Hotel, 52 La. Ann. 1581, 1584, 28 So. 182, 186 (1899); see Franklin, Equity in Louisiana, 9 Tulane L. Rev. 485 (1935). However, it is frequently stated that from a theoretical viewpoint there can be no constructive trust in a civil law jurisdiction. See Patton, Future of Trust Legislation in Latin America, 20 Tulane L. Rev. 542, 548 (1946); see Wisdom, The Louisana Trust Estates Act, 13 Tulane L. Rev. 70, 83 (1938)." Note, 26 Tul. L. Rev. 262 (1952). See also Note, 25 La. L. Rev. 276, 280 (1964).

Since all transfers of immovable property must be in writing and, under LSA-C.C. Arts. 2275, 2276, 2440, parol evidence is not admissible to vary the terms of a written conveyance or to prove an oral agreement of sale, a defrauded principal or joint venturer cannot through parol evidence prove title to immovables purchased by an agent or joint venturer under an oral mandate. Serto v. LeBlanc, 191 La. 137, 184 So. 567 (1938); Ceromi v. Harris, 187 La. 701, 175 So. 462 (1930); see Note, 21 Tulane L. Rev. 286 (1946). However, parol evidence may be used to prove fraud or error in an action to rescind written sales of real estate. Baker v. Baker, 219 La. 1041, 26 So. 2d 132 (1946); LeBleu v. Savoie, 109 La. 680, 33 So. 729 (1903); cf. Reid v. Phillips, 177 La. 497, 148 So. 690 (1933).

There are, however, a number of loose references in Louisiana decisions to "constructive trusts". McClendon v. Bradford, 42 La.

[fol. 2221] made the subject of a verbal agreement and cannot be proved by parol evidence". *Hayes v. Muller,* La. App. 1962, 146 So. 2d 176, 179. On remand, the law the district judge must conjure up is as uncertain and insubstantial as the "brooding omnipresence in the sky", of which Justice Holmes spoke, because this evanescent law

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Ann. 160, 7 So. 78 (1890); Gervais v. Gervais, 9 Orl. App. 69 (1911); Gaines v. Chew, 2 How. 619, 650 (U. S. 1844); Berthelot v. Isaacson, 5 Cir. 1922, 278 Fed. 921, 923. A result similar to the common law constructive trust has been attained in Louisiana decisions holding that title to *movable* property which is acquired by an agent through a breach of his fiduciary duty inures to the benefit of the principal. Sentell v. Richardson, 211 La. 288, 29 So. 2d 852 (1947); noted in 22 Tulane L. Rev. 196, and 8 La. L. Rev. 223 (1948) (purchase of hospital stock). Or when an agent acquires his principal's property by fraud or error. Assunto v. Coleman, 158 La. 537, 104 So. 318 (1925) (agent purchased principal's property at judicial sale).

Mansfield Hardwood Lumber Co. v. Johnson, 5 Cir. 1959, 268 F.2d 317, 319, 324, is a good example of federal court handling of Louisiana decisions in this area of the law. There this Court agreed "that the Louisiana Civil Law prohibits the imposition of a constructive trust or equitable lien on property". The Court recognized however that under LSA-C.C. Art. 1847 "a breach of the fiduciary relationship is called fraud [not constructive fraud] and the remedy is, of course, a rescission of the contract or damages. By bringing such relationship under the broad heading of fraud, the Louisiana courts have, in effect, reached the same results as would be reached under the common-law-results which seem to common-law lawyers hard to obtain under a literal interpretation of the Civil Code." Accordingly, in *Mansfield* the district court rescinded the sale of the plaintiff's stock to the defendant, recognized the plaintiffs as the owners of the stock, and ordered the defendant to render an accounting to the plaintiffs.

All of this adds up to the fact that by different theories the civil law reaches many of the results the common law reaches. There is no exact civilian equivalent to the Anglo-American resulting trust or constructive trust. Here, the claimants may suffer from the difference between the two legal systems. But the difference in remedies generally is not so great as to justify the majority's far-out idea that Louisiana's lack of resulting and constructive trusts, as the Lord Chancellor knows them, substantially interferes with the national policy on mineral reserves.

is *not* the articulate voice of a sovereign that can be identified.[6]

The holding of the Court carries alarming implications. If federal common law controls and the claimants hold an equitable title by virtue of a constructive trust, what is Mrs. Wallis's interest? Assuming that Wallis has a part interest as lessee, does his wife have half of his interest as her share in the community? Or is she a common law partner with him? Or does she have no interest in the lease? Are Wallis's children deprived of their legitim, their forced portion of their father's estate, as to their father's interest in the lease? I hope my fears are all bloodless ghosts. But if a federal court, in the name of interstitial law-making, may concoct a Law of Property, Law of Contracts, Law of Restitution and, perhaps, a Law of Descent and Distribution for Mississippi Mud-Lumps, I foresee the fashioning of some fancy legal systems for a great many federal enclaves within the borders of the states.[7]

[fol. 2222] II.

"There is", of course, "no federal general common law".[8] However, the term "federal common law", like Justice Rutledge's substitute term, "law of independent judicial

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[6] "The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi-sovereign that can be identified." Southern Pacific Co. v. Jensen, , 244 U. S. 205, 222, 37 S.Ct. 524, 61 L.Ed. 1086. Cf. Clark, State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins, 55 Yale L. J. 205, 274 (1946).

[7] "Establishing a body of substantive law for federal courts in matters not otherwise of federal concern is not a legitimate end within the scope of the Constitution; thus to frustrate the ability of the states to make their laws fully effective in areas generally reserved to them would be inconsistent with the constitutional plan." Friendly, supra, n. 3 at 397.

[8] Erie R. Co. v. Tompkins, 1938, 304 U. S. 64, 78, 58 S. Ct. 817, 82 L. Ed. 1188.

decision",[9] is an acceptable euphemism for federal judicial legislation. No one can quarrel with such law-making when congressional intent and national interest speak in the loud, clear voice of the sovereign. But the fact that there are interstices in a federal statute is not enough in itself to justify a court's applying federal common law. There are interstices in every statute.

Before a court plugs a statutory gap with federal law that is inconsistent with local law and that here is also contrary to established state policies, consideration for the position of the states in the federal system suggests that the Court find congressional intent that federal common law should prevail over state law.[10] "The political logic of federalism supports placing the burden of persuasion on those urging national action."[11] When congressional intent is unclear or when a specific congressional intent never existed, a reasonable criterion is that judge-made [fol. 2223] common law should not prevail over local law unless that result is manifestly in the national interest. Uniformity for uniformity's sake does not meet this criterion; under *Erie* and the Rules of Decision Act, diverse local law controls the hum-drum disputes of private litigation that do not raise a federal question and do not conflict with the interests of United States. In this case, I find no congressional intent and no compelling national interest sufficient to justify an independent federal rule displacing long accepted state law.

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[9] United States v. Standard Oil Co., 1947, 332 U. S. 301, 308, 67 S. Ct. 1064, 91 L. Ed. 2067.

[10] "The issue that must be determined in each instance is what heed Congress intended to have paid to state law in an area where no heed need constitutionally be paid—more realistically, in Gray's famous phrase, 'to guess what it would have intended on a point not present to its mind, if the point had been present.' We cannot expect that we shall always agree with the answer to such a question; we do have a right to expect that the question shall always be put." Friendly, n. 3, at 410.

[11] Wechsler, The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, 54 Colum. L. Rev. 543, 545 (1954).

This is a dog-eat-dog, no-holds-barred fight between private persons, each crying foul, over the nature of the ownership of a lease. Resolution of the controversy depends upon legally acceptable proof of the relationship of Wallis to McKenna and Pan American. It is true that the acts generating the litigation took place before execution of the lease. The point in time when these acts occurred, however, is not important to the United States as lessor, as it was in *Irvine v. Marshall*, 1858, 20 How. 558, 15 L. Ed. 994, since the dispute arose *after title to the mineral leasehold had passed from the United States to Wallis.*[12] Be-

[12] In the instant case the entire title, legal and equitable, to the mineral leasehold passed at the time the lease was executed. In Irvine v. Marshall, on which the Court relied so strongly in the original opinion, the patent had not been issued to either of the competing parties. The Supreme Court recognized, however, that an entirely different rule would apply *once legal title had in fact passed from the United States*:

> "We hold the true principle to be this: that whenever the question in any court, State or Federal, is whether a title to land which was once the property of the United States has passed, that question must be resolved by the laws of the United States; but that whenever, according to those laws, the title shall have passed, then the property, like all other property in the State, is subject to state legislation, so far as that legislation is consistent with the admission, that the title passed and vested according to the laws of the United States."

Pan American Petroleum Corporation v. Pierson, 10 Cir. 1960, 284 F.2d 649, cert. denied, 366 U. S. 936 supports Wallis's position. The Court held that the Secretary has no "authority to cancel an oil and gas lease for fraud of a lessee precedent to lease issuance". The Court said: "[T]he government, by the issuance of the lease, has performed the last act required of it to vest in the lessee the right to explore for, produce, market and sell the oil and gas underlying the leased premises." 284 F.2d at 654. The effect of this decision is uncertain, however, in view of Boesche v. Udall, 1963, U.S. , 83 S. Ct. , L.Ed.2d , holding that the Secretary has the administrative power, beyond § 31 of the Act, to cancel a lease because of an administrative error; § 31, allowing cancellation for the lessee's non-compliance with any of the provisions of the lease, applies only to situations in which a valid lease has been issued. The Court in *Boesche* was aware of *Pan American*, but did not discuss the case and spoke only in terms of administrative error. See Miller, The Historical Development of the Oil and Gas Laws of the United States, 51 Col. L. Rev. 506, 530 (1963).

sides, McKenna and Pan-American do not question the va- [fol. 2224] lidity or effectiveness of the transfer of the mineral leasehold from the United States to Wallis. On the contrary, it is essential to their position that they accept the validity of Wallis's lease: McKenna claims a one-third interest in the lease as a joint venturer; Pan-American demands an assignment of the lease under an option contract.

Whether Wallis holds the lease for himself or for others and whatever the interests of McKenna and Pan-American may be as against Wallis, the United States is protected by the terms of the lease and by statutory requirements that the Secretary of Interior investigate and approve Wallis and any assignee or sublessee. The United States owns the fee and exercises tight control over the lease through the Secretary's power to prescribe rules and regulations governing in minute detail all facets of the working of the land leased.

[fol. 2225] The United States has of course a proper interest in knowing the nature of the lessee's ownership. In the first place, the policies of the United States in favor of conservation of national resources and prevention of monopolies require the Secretary to know the true owners of the lease. The Act provides, therefore, for full disclosure of the lessee's interest in order to prevent lease-grabbing through the use of strawmen. Second, for obvious reasons, it is administratively convenient for the Secretary to deal with the record owner as the true owner. In general, these policies and interests will necessarily be affected adversely by the common law's recognition of unwritten, undisclosed trusts arising from the breach of a fiduciary relationship unknown to the Secretary. On the other hand, the civilian antipathy to oral, hidden trusts and equitable liens works hand in glove with the policies and interests of the United States. Certainly in this case, Judge Wright's adjudication that McKenna and Pan-American have no provable claim to the lease represents the optimum Congress and the Secretary could expect in

administrative convenience and in the disclosure of outside interests.

Beyond all of this, a serious question exists as to whether the doctrine of separation of powers permits the judiciary, in effect, to force lessees upon the executive. And there is also the question whether the Act allows a court to select as assignees persons whom the Secretary has not investigated and formally approved. The policy objectives of the statute and its protective provisions may be easily circumvented, if courts have the power to reverse the Secretary's choice of lessee by recognizing third [fol. 2226] parties as the legal lessees by virtue of an unwritten option, assignment, or joint venture.

III.

In concluding that the issue for decision is a federal matter the Court, if I may say so, relied on this syllogism: (1) the federal Mineral Leasing Act permits options and assignments of leases approved by the Secretary; (2) here, in essence, the claims are an alleged option and an alleged assignment; (3) therefore the claims are a federal matter. This reasoning does not stand up.

The Court's conclusion is a glaring non sequitur, unless the terms "option" and "assignment" are taken to include contested, amorphous claims such as McKenna and Pan-American present. But this is an impossible construction of the Act. Congress could have intended only that the Secretary approve uncontested options and assignments or, possibly, such agreements validated by adjudication. If a court has decreed the validity of a formal lessee's total ownership of a lease against third persons, or, in another case, if a court should validate all or part of the transfer of a lessee's interest, it is difficult for me to understand what difference it makes to the United States whether the Court used state law or federal common law.

The Secretary has the ability to prevent a lease from falling into the hands of someone who should not have it.

The Secretary's determination that a lease or an assignment of a lease meets the requirements of the Act evidences compliance with the rules and regulations protecting [fol. 2227] the interests of the United States. That determination is unquestionably a federal matter. But the rights of action, if any, of McKenna and Pan-American against Wallis are state-created. And their validity or invalidity is determinable without regard to the Act, the regulations, or the Secretary's approval. In short, here, as in tax law or in federal procedure or in many other areas of the law where the nature of a litigant's interest unquestionably is important to the federal government—absent a conflict between the State and the Nation, accepted principles of federalism recognize that state law should determine the nature of the litigant's property interest, and federal law should determine the federal rules applicable to that particular type of property ownership.[13]

The Court's reasoning seems to overlook McKenna. McKenna claimed as a joint venturer, not as an assignee. I do not see how his claim can be lumped with Pan-American's claim. If the reference in the Act to secretarial approval of options and assignments makes a federal matter of all litigation touching such contracts, the statutory silence with respect to joint ventures should be taken to mean that McKenna's alleged joint venture with Wallis

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[13] Professor Hart comments: "But the decisions yield no simple rule of thumb for choosing. They cannot. Particularly is this so in the subtler situations in which federal legislation is building upon legal relationships established by the states and its power is one of characterization only and not of alteration of the substance of the relation. Federal tax law, for example, can say what state-created interests are to be taxed, and can characterize them in any way it chooses; but it cannot create the interests. Similarly, federal bankruptcy law can dissolve state-created interests in any way it thinks equitable; but it is hard to see how it can create, or recognize in liquidation, interests which never had any existence under state law." Hart, The Relations Between State and Federal Law, 54 Col. L. Rev. 489, 535 (1954).

is not a federal matter. I do not underscore this point. [fol. 2228] I mention it only to demonstrate that no special federal significance should be attached to the mention of "options" and "assignments" when it is manifest that the Secretary's approval of all original leases and all transfers is required under the Act.

IV.

After finding that the plaintiffs' claims were "federal matters", the Court still could not fashion and apply federal common law without first holding that application of state law would seriously affect adversely the interests of the United States. The Court managed this conclusion in just one sentence:

> "We do not think the use of these devices [assignments and options] as a part of the scheme of carrying forth this public policy [the development of our mineral resources and increasing our domestic reserves] should be limited by the interstitial restrictions imposed by the law of the State of Louisiana, which are not present in the other states."

The fact is, Louisiana imposes no special limitations, interstitial or otherwise, on assignments and options. Louisiana does require, as do common law states, that all contracts affecting immovables (real property), including mineral leases, be in writing. The Statute of Frauds is no stranger to the common law. The only pertinent Louisiana limitation affecting mineral leases is the rule against resulting and constructive trusts. This established civilian principle,—as a practical matter, a principle rarely called [fol. 2229] into operation—is the sole and narrow basis for the Court's holding that if state law is applied the Nation will suffer.

If this one-sentence finding on which the Court's decision rests is corrected and paraphrased realistically, the holding shakes down to this bizarre result:

> Trusts ex maleficio are part of the congressional scheme for carrying out the national policies on mineral resources and monopoly. In litigation between private persons over the nature of the ownership of a federal mineral lease, as among themselves, national policies on mineral resources and monopoly will suffer unless courts recognize beneficial title to the lease in a claimant whom the Secretary has not investigated, has not approved as lessee, and may be unknown to the Secretary.

To restate this holding in accurate, realistic terms is to expose the unreal, speculative character of the Court's notion that federal common law controls this case.

V.

I find no decisional and no doctrinal support in the majority's position. I turn now to a small sampling of leading cases.

Clearfield Trust Co. v. United States, 1943, 318 U. S. 363, 63 S. Ct. 573, 87 L. Ed. 838, was the Supreme Court's first important decision on federal common law after *Erie.* [fol. 2230] The United States sued to recover on an express guaranty of prior endorsements on a government check containing a forged endorsement. The court held that state law was inapplicable. The United States was a party to the litigation, but more importantly since the right of the United States to recover for conversion of a government check is a federal right, the courts of the United States could properly formulate a rule of decision. Uniformity was desirable; state law would be "singularly inappropriate" because its application to commercial paper of the United States "would subject the rights and duties of the United States to exceptional uncertainty".

Mr. Justice Douglas, author of the *Clearfield* opinion has recently cast some doubt on its scope:

> As respects the creation in the federal court of common-law rights, it is perhaps needless to state that we are not in the free-wheeling days antedating Erie R. Co. v. Tompkins, 304 U. S. 64. *The instances where we have created federal common law are few and restricted.* In Clearfield Trust Co. v. United States, 318 U. S. 363, we created federal common law to govern transactions in the commercial paper of the United States; and we did so in view of the desirability of a uniform rule in that area. Id., p. 367. But even that rule was qualified in Bank of America v. Parnell, 352 U. S. 29. (Emphasis supplied.) *Wheedlin v. Wheeler*, 1963, 373 U. S. 647, 83 S.Ct. 1441, 10 L.Ed.2d 605.

[fol. 2231] This brings us to *Bank of America v. National Trust and Savings Association v. Parnell*, 1956, 352 U. S. 29, 77 S. Ct. 119, 1 L. Ed. 2d 93, one of the two authorities cited in the opinion on rehearing for the majority's principal holding. As in the instant case, *Parnell* was a diversity action between private persons. The suit was over stolen bearer bonds (in a general sense analogous to the lease here) issued by the Homeowners Loan Corporation, a federal agency, and guaranteed by the United States. The Bank sued to recover the value of the bonds Parnell had cashed. The Court held that federal law controlled the question whether the bonds were "overdue", because it related to the nature of the rights and duties of the Government. But the Court held also that state law controlled the question whether Parnell had met the burden of proving good faith. "Government securities" generate immediate interests of the Government, but the "present litigation is purely between private persons and does not touch the rights and duties of the United States". The possibility that "the floating of securities of the United States might somehow or other be adversely affected by the local rule of a particular State regarding the liability of a converter . . . is far too speculative, far too remote a possibility to

justify the application of federal law to transactions essentially of local concern". 352 U. S. at 33. See Wright, Federal Courts, § 60 at 216 (1963). Parnell is clearly contrary to the majority opinion.

Free v. Bland, 1962, 369 U. S. 663, 82 S. Ct. 1089, 8 L. Ed. 2d 180, turned on a specific Treasury regulation designed to make savings bonds attractive to purchasers by a survivorship provision eliminating the necessity for [fol. 2232] expensive or time-consuming probate proceedings. To allow state law to frustrate this purpose would permit the states to constrict money designed to help the federal treasury borrow money. In line with *Clearfield* and *Parnell,* the Court applied federal law. The Court made the following comment on *Parnell,* a comment appropriate here:

> "[T]hat case [Parnell] held that, in the absence of any federal law, the application of state law . . . was permissible, *because the litigation between the two private parties there did not intrude upon the rights and duties of the United States,* the effect on the only possible interest of the United States—the floating of securities—being too speculative to justify the application of federal law."

In *Free v. Bland,* state law conflicted with a distinct federal rule the Treasury had consistently advocated and which supported the paramount interests of the United States.

Although United States was a party in *Clearfield* and its presence in litigation may in some cases be a factor, the principal teaching of *Clearfield, Parnell,* and *Free v. Bland,* as a group, is that federal common law is applicable when the state law substantially conflicts with the rights of the United States and where lack of uniformity causes "exceptional uncertainty" in determining the rights and duties of the United States.

Textile Workers Union of America v. Lincoln Mills of Alabama, 1957, 353 U. S. 448, 77 S. Ct. 912, 1 L. Ed. 2d [fol. 2233] 972, is not cited in the Court's opinion on rehearing but apparently is implicit in the Court's reliance on interstitial law-making. *Lincoln Mills* involved specific performance of an arbitration clause in a labor contract. Under § 301 of the Taft Hartley Act, federal courts have jurisdiction over suits on labor contracts affecting interstate commerce, although there is no specific provision about enforcing arbitration clauses. The Supreme Court held that § 301 was a mandate to fashion and apply a federal common law governing labor contracts. It should be remembered, however, that specific performance of arbitration agreements was prohibited by the law of Alabama, contrary to the strong congressional policy in favor of enforcement of labor arbitration. "To be consistent with that [congressional] policy you need to have specific performance of the arbitration agreement; that would bolster the policy rather than detract from it; so in this area the issue may be federal, that is, subject to federal common law rather than state law if that issue, though not covered squarely or impliedly by any federal statute or any federal treaty or constitutional provision, nevertheless would substantially affect the policy of such federal law." Morgan, The Future of Federal Common Law, 17 Ala. L. Rev. 10, 14 (1964). Again, as "Judge Rives [has] pointed out, there was behind *Lincoln Mills* a clear discernible federal policy in favor of collective bargaining agreements" and also "a huge body of federal labor law on which the courts draw in fashioning a substantive body of labor contract law".[14] This is legitimate "interstitial legislation" because of discernible congressional policy. [fol. 2234] Dean Cowen, more accurately, calls it a "delegation" by Congress to the Judiciary of a portion of its

[14] Morgan, The Future of Federal Common Law, 14 Ala. L. Rev. 10, 31 (1964).

legislative power.[15] There is of course no federal policy touching resulting and constructive trusts of federal mineral leases; no substantial conflict between the state and federal policies; no clear mandate to fashion a federal substantive law of trusts ex maleficio affecting mineral leases.

The other case the Court relies on is *Francis v. Southern Pacific Co.*, 1948, 333 U. S. 445, 68 S.Ct. 611, 92 L. Ed. 798.[16] But *Francis* lends no support to the majority. In *Francis*, the Supreme Court based its decision on the "accepted and well-settled construction of the Act" that the liability of an interstate carrier to one riding on a free pass was determined not by state law but by the Hepburn Act. This construction has been "unchallenged" in the Supreme Court and "in Congress too". The Transportation Act of 1940 reenacted the free pass provisions "without further change or qualification". The Court said, therefore, that it was "not writing on a clean slate"; "the long and well-settled construction of the Act plus reenactment of the free-pass provision without change of the estab- [fol. 2235] lished interpretation" had become "part of the warp and woof of the legislation". "State law which conflicts with this federal rule governing interstate carriers must therefore give way by virtue of the Supremacy Clause".[17]

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[15] Id. at 17.

[16] A note, The Competence of Federal Courts to Formulate Rules of Decision, 77 Harv. L. Rev. 1084, 1090 (1964) contracts Francis v. Southern Pac. Co. with Regents of the Universal System v. Carroll: "The Supreme Court occasionally has been guilty of failure to inquire into the extent of the interest evinced by a federal statute 'involved' in a litigation. In *Francis* v. *Southern Pac. Co.*, for example, . . . In contrast with *Francis*, the Court made careful inquiry into the interest evinced by the legislation 'involved' in *Regents of the Univ. Sys. v. Carroll*. There it was held that although the Federal Communications Commission has authority to regulate the transfer of radio licenses, the construction of contracts transferring the control of a station or its property is governed by state law." See also Wright, Federal Courts § 60 at 218.

[17] 333 U. S. at 450.

The "presence of a federal statute does not necessarily imply that there is a congressional intent that any particular issue be resolved by reference to federal law".[18] The Federal Communications Act is unquestionably a comprehensive statute regulating a subject of national importance in which the United States has an overriding interest. Just as the Mineral Leasing Act regulates the issuance and transfer of federal mineral leases, the Communication Act regulates the issuance and transfer of radio licenses. *Regents of the University System of Georgia v. Carroll,* 1950, 338 U. S. 586, 70 S.Ct. 370, 94 L. Ed. 363, concerned the construction of a contract transferring the licensee's control of its radio station to a broadcasting company. When the licensee repudiated the contract, the [fol. 2236] broadcasting company sued for an accounting. The Court held that state law governed the relationship between the parties as established by the contract between the parties. The Court's reasoning is clearly applicable to the parallel situation the instant case presents:

> "Congress has enabled the Commission to regulate the use of broadcasting channels through a licensing power.

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[18] Note, The Competence of Federal Courts to Formulate Rules of Decision, 77 Harv. L. Rev. 1084, 1090 (1964). "Although Congress has in rare instances delegated to the judiciary the authority to create a comprehensive body of decisional law in a particular area, the role of the courts is ordinarily interpretative and implemental. The exercise of this judicial competence is premised on the inevitable incompleteness of legislation. A statute may be sufficiently vague that its application to a particular controversy is unclear; it may have omitted ancillary but necessary procedural rules; or it may have created a cause of action whose elements are defined only in general terms, leaving refinements to the judiciary. In these cases it is the task of the judiciary to fill in the legislative lacunae in the manner most compatible with the statutory framework. The scope of judicial lawmaking varies inversely with the clarity of the policies discernible from the statute and its legislative history, but judicial lawmaking competence is properly limited to issues in which the congressional program evinces a legislative interest." Id. at 1089.

> . . . The Commission may impose on an applicant conditions which it must meet before it will be granted a license, but the imposition of the conditions cannot directly affect the applicant's responsibilities to a third party dealing with the applicant. . . . We do not read the Communications Act to give authority to the Commission to determine the validity of contracts between licensees and others." 338 U. S. at 600, 602.

Within the scope of its objectives as a mineral leasing law, the Act here is comprehensive and no doubt has many interstices to be filled, in the proper case, by judicial resort to federal common law. But the Act does not purport to go beyond the lessee and lessor. The Secretary, like the Federal Communications Commission, may impose conditions that the lessee must meet, but the Secretary, although interested in disclosure of the nature of the lessee's interest, has not tried to affect the legal relationship of the lessee to third parties. The controversy between the litigants, as it did in *Carroll,* takes place outside the Act, not within an interstice of the Act.

[fol. 2237] The only case squarely in point is *Blackner v. McDermott,* 10 Cir. 1949, 176 F.2d 498, which the Court noted as "involving a claim of 'joint venture' highly similar to McKenna's claim here", but declined to follow. The Tenth Circuit applied the law of Wyoming for the reason I would apply the law of Louisiana: the issue was "the relationship of the parties each to the other in respect of the leasehold estate".

Decisions in this circuit in the area of federal decisional law are not distinguished for their consistency.

In *United States v. Sylacauga Properties, Inc.,* 5 Cir., 1963, 323 F.2d 487, we held that state law was inapplicable in a suit to foreclose an FHA mortgage under the National Housing Act. See also *United States v. Taylor,* 5 Cir. 1964, 333 F.2d 633, holding that federal law rather than state law applies to the interpretation of a disputes clause in a contract between private parties where there is a

sufficient federal interest. The federal interest was in controlling and effecting prompt settlement of disputes between a sub-contractor and a prime contractor engaged in construction work for the Atomic Energy Commission. But see *United States v. Yazell,* 5 Cir. 1964, 334 F.2d 454, an action to recover on a note for a loan from the Small Business Administration. This Court held, surprisingly, perhaps, that the capacity of a married woman to contract with the federal government is controlled by state law, notwithstanding the effect such a decision might have on the administration of the national program for assistance to small business.

[fol. 2238] *Leiter Minerals, Inc. v. United States,* 5 Cir. 1964, 329 F.2d 85; affirmed subject to abstention, 1957, 352 U.S. 220, 77 S. Ct. 287, 1 L.Ed.2d 267, cannot be reconciled with the majority's holding in the instant case. In 1935, the United States, acting under the Migratory Bird Conservation Act, contracted to purchase almost 9000 acres of land in south Louisiana. The seller reserved the minerals for a ten-year period with provisions for extensions of five years so long as certain minimum use was made of the rights. In Louisiana the sale or reservation of mineral rights establishes only a servitude or right to extract the minerals. Servitudes prescribe in ten years for nonuse, a prescription that cannot be avoided by contract. In 1938, before the conveyance, the Louisiana legislature adopted a statute providing that prescription of mineral rights should not run against the State or United States. This legislation was replaced by Act 315 of 1940 restricting the exemption to the United States. The Louisiana court held that Act 315 would not apply if the deed provided for a mineral servitude for fixed term, but would apply if the term were indefinite. Leiter Minerals, Inc., successor to the seller of the land, filed suit in 1953 to have itself declared owner of the mineral rights. The United States then filed suit to quiet title. This Court, applying state law, held that the reservation was for an indefinite term. Here, therefore, we have the United States a party to the liti-

gation concerning its rights under a contract entered into pursuant to a federal statute. Directly affected are national policies under that statute, policies relating to the conservation of our national resources, and settled policies of federal land acquisition. Presumably the Govern-
[fol. 2239] ment paid more to obtain the favorable term. "It seems reasonable to assume a congressional intent that rights for which the Government has paid not be taken away by operation of special state legislation directed against the United States." Note, 78 Harv. L. Rev. 891, 895 (1965). Finally, the case involved state legal concepts exceptionally complex and foreign to common law concepts. I must say, if federal common law applies in the case now before this Court, *Leiter Minerals, Inc.* was an *a fortiori* case for federal common law. This Court held otherwise:

> "We have no doubt that the Congress could make federal law applicable, but we are equally clear that it had no intention to do so when it merely authorized the contract by which the United States acquired the property. State law must govern in the absence of a federal statute making federal law applicable. . . . [T]he rules of decision act always has had 'application to state laws, strictly local, that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character.' Swift v. Tyson, 1842, 41 U.S. (16 Pet.) 1, 18, 10 L.Ed. 865." *Leiter Minerals, Inc. v. United States,* 5 Cir. 1964, 329 F.2d 85, at 90.

[fol. 2240] In sum, I can find no decisional or doctrinal justification for applying judge-made federal common law to a private dog-fight in which the federal government's interest, if any, seems to me to be that of a bored spectator. The speculation that trusts ex maleficio are part of the con-

gressional scheme for conserving natural resources hangs by too fine a thread for me to see the connection. Under *Erie* and the Rules of Decision Act, Louisiana may decide for itself whether to preserve its civil law institutions or adopt alien institutions. The philosophy that brought American federalism into being keeps the national government out of local transactions involving only the determination of the nature of the legal relation of one person to another.

[fol. 2241] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 2242]

SUPREME COURT OF THE UNITED STATES

No. 341, October Term, 1965

FLOYD A. WALLIS, Petitioner,

v.

PAN AMERICAN PETROLEUM CORPORATION, ET AL.

ORDER ALLOWING CERTIORARI—October 11, 1965

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted, and the case is placed on the summary calendar. The Solicitor General is invited to file a brief expressing the views of the United States.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.